Pottawatomi Nation in Canada

Senate Bill 60

A Relief Bill for the Settlement of Certain Claims Against the United States

About the Legislation:

➢ **Senate Bill 60 is Budget Neutral and Non-Controversial**

S. 60 is a budget neutral, non-controversial bill that settles long standing litigation between the United States and the Pottawatomi Nation in Canada. The funds for the final settlement are paid out of the Judgment Fund—funds appropriated each year to the U.S. Treasury for payment of judgments against or compromise settlements with the United States. Since the money is already appropriated, there is no budgetary impact. The settlement is supported by the Department of Justice, the Department of the Interior, the U.S. Court of Federal Claims, the National Congress of American Indians, and other Indian tribes, including the Pottawatomi Bands in the United States. The 10,000 members of the Pottawatomi Nation in Canada intend to use the funds to set up a charitable trust that provides education scholarships, aids community programs, and creates economic development opportunities for their people.

About the Pottawatomi Nation in Canada:

➢ **Pottawatomi Nation in Canada is a Historic American Indian Tribe**

The Pottawatomi Nation in Canada is comprised of descendants of the Historic Pottawatomi Nation which once held title to a vast expanse of lands in the present States of Ohio, Michigan, Indiana, Illinois and Wisconsin. Under the 1833 Treaty of Chicago, the United States had promised certain lands west of the Mississippi River to the Historic Pottawatomi Nation, as well as the payment of annuities, in exchange for ceding their remaining title to lands east of the Mississippi River. The United States unilaterally changed the negotiated Pottawatomi reservation lands to a less desirable location, and began a campaign of forcible removal. Members of the Wisconsin Band of Pottawatomi resisted forced removal, with many being pursued by federal troops and mercenaries and finding it necessary to flee into Canada. Despite their residency in Canada, in 1908 the Secretary of the Interior stated that they should be counted as members for the Wisconsin Band of Pottawatomi for the purpose of an annuity payments bill:

> *"The fact of their residence in a foreign country is held not to affect their right to enrollment with the Pottawatomi of Wisconsin for the purposes of [annuity payments]..."*

About the Settlement Agreement:

➢ **Senate Bill 60 Redresses the Longstanding Injustice with a "Fair, Just and Equitable" Settlement Agreement Between the Pottawatomi Nation in Canada and the United States of America**

Under the 1833 Treaty of Chicago—the last in a series of treaties from 1795 to 1833 ceding millions of acres of land—the United States restated and acknowledged its obligations ***to pay certain annuities*** for the ceded lands. In his 1835 letter to Andrew Jackson, Pottawatomi Chief Che-Che-be-quay reminded the President of the promises made by the United States to his people and stated his trust "that our great father will do us justice hereafter." While the Pottawatomi tribes in the United States eventually received their share of payments, the Pottawatomi Nation in Canada has diligently, but unsuccessfully until now, pursued redress of its claims through the U.S. Congress and the U.S. Courts for over 100 years. The Department of Justice carefully crafted the $1,830,000 settlement agreement to resolve an outstanding obligation of the United States and assure the government of finality. The Judicial Hearing Officer and the Review Panel of the Court of Federal Claims have unanimously found that this settlement was not a gratuity, but was ***"predicated on a credible legal claim"*** and is ***"in the interests of justice."*** The Court unanimously recommended that Congress enact legislation approving this settlement to redress this longstanding injustice.

For more information please contact:
Richard Guest, Native American Rights Fund, (202) 785-4166, richardg@narf.org

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Pottawatomi Nation in Canada

Treaty Claims Resolution Process — 1903-Present

U.S. Court of Federal Claims

Private Relief Bill Passed by Congress and Filed with Court of Federal Claims Oct. 1994

⇩

Complaint Filed—Feb. 1995
Settlement Negotiation begins—June 1997

⇩

Settlement Agreement Entered Into May 2000

⇩

Hearing Officer Report—Sept. 2000
Review by Three Judge Panel—Dec. 2000

⇩

Report to Senate Recommending Settlement Funding—Jan. 2001

U.S. Legislative Process

Settlement Legislation Introduced by Sen. Inouye in 107th-112th Congress (2001-2011)—Currently Senate Bill 60

⇩

Settlement Legislation to be Introduced in House of Representatives

⇩

Senate and House Committee Hearings to be Held on Legislation

⇩

Committees Vote on Legislation

⇩

Once Passed by Congress—
the President Signs Bill into Law

⇩

Under Agreement, PNC has Three Years to Complete Claim for Disbursement of Funds from U.S. Once the Bill is Signed

Canadian Class Action

Must File Class Action in Ontario Initiated via Application with Canadian Trust Company as Respondent

⇩

Class Must be Certified, Include all PNC Descendants, & Declare Entitlement to Funds

⇩

Final Judicial Approval of Settlement Terms After Exhaustion of Appeals

⇩

Class Notifies U.S. Attorney General of Final Judicial Approval in Writing

⇩

Attorney General Notifies Secretary of Interior of Judicial Approval Within 30 Days

⇩

Secretary Certifies the Disbursement of Funds to the Trust Company Through a Certification Voucher Under 31 U.S.C. §§ 3321 & 3325 Within 30 Days of the Attorney General's Notification

Richard A. Guest
Staff Attorney
Native American Rights Fund
1514 P Street, NW (Rear)
Suite D
(202) 785-4166
richardg@narf.org

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"Our Great Father Would Do Us Justice Hereafter"

Senate Bill 60

A Bill for the Relief of the Pottawatomi Nation in Canada for the Settlement of Certain Claims Against the United States

112th Congress

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"Our Great Father Would Do Us Justice Hereafter"

Senate Bill 60

A Bill for the Relief of the Pottawatomi Nation in Canada for Settlement of Certain Claims Against the United States

112th Congress

Senate Bill 60 (S. 60) is a non-controversial bill that authorizes payment of $1,830,000 to the Pottawatomi Nation in Canada (from amounts appropriated under 31 U.S.C. § 1304) which the U.S. Department of Justice agrees would be a "fair, just and equitable" settlement of this legal claim and will allow the United States to uphold their treaty obligations for a tribal group that has for far too long been denied justice.

Historical Background

The claim of the Pottawatomi Nation in Canada stems from the failure of the United States to make annuity payments as promised in a series of treaties between the Historical Pottawatomi Nation and the United States from 1795 to 1833. The *Stipulation for Recommendation of Settlement* (Attachment G) in this matter is based on an analysis of hundreds of historical documents, treaties, statutes and case law summarized below.

The Historical Pottawatomi Nation was aboriginal to the United States and held title to a vast expanse of lands east of the Mississippi River in what are now the States of Ohio, Michigan, Indiana, Illinois, and Wisconsin. Through a series of treaties of cession—many of which were made under extreme duress and the threat of military action—the United States annexed most of the traditional lands of the Historical Pottawatomi Nation. In exchange, the Pottawatomis were given promises that the remainder of their lands would be secure and the United States would pay certain annuities to the Pottawatomi.

In 1829, the United States formally adopted the Policy of Removal—an effort to remove all Indian tribes to the west and to extinguish all Indian title to lands east of the Mississippi River. In furtherance of the removal policy, the federal government increasingly pressured the Pottawatomis to cede the remainder of their traditional lands—approximately five million acres in and around the city of Chicago. In 1833, Treaty Commissioners were able to use the threat of war to convince the Pottawatomi leaders to sign what became the Treaty of Chicago. In exchange for their traditional lands, the Treaty of Chicago provided that the United States would give to the Pottawatomis five million comparable acres of land in what is now the State of Missouri and would provide certain annuity payments.

However, the United States unilaterally switched the land promised for less desirable land located in what is now the State of Iowa and, as a result, many of the Pottawatomis refused to relocate. The court record in this matter includes a letter from Che-che-be-quay, et al., to Andrew Jackson, President of the United States, in 1835 which reads:

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> When you sent your commissioners, some two or three years ago, to make a treaty with us, we were glad to see them. We are always glad to see the officers of our great father. But when they proposed to give us lands beyond the great river, we told them that we were strangers to that country, and that we must send a deputation to see that land before we could treat with them. They answered us and said that we must make a treaty, that the land was good, was better than our old hunting grounds, and that we might send a deputation after the treaty, and if we did not obtain good lands, that our great father would do us justice hereafter.

By 1836, the United States began to forcefully remove Pottawatomis who remained in the east—with devastating consequences. As is true with many other American Indian tribes, the forced removal westward came at great human cost. Many of the Pottawatomi were forcefully removed by mercenaries who were paid via per capita government contracts. Over one-half of the Indians removed by these means died en route. Those who reached Iowa were almost immediately removed further to inhospitable parts of Kansas against there will and without their consent. Aware of these devastating consequences, many of the Pottawatomis, including most of those in the Wisconsin Band, vigorously resisted forced removal. In their efforts to avoid federal troops and mercenaries, much of the Wisconsin Band ultimately found it necessary to flee to Canada—oftentimes pursued to the border by government troops, paid mercenaries or both.

By the late 1830s, the government refused payment of annuities to any Pottawatomi groups that had not removed west including those who fled to Canada. In the 1860s, members of the Wisconsin Band—those still in their traditional territory and those forced to flee to Canada—petitioned Congress for the payment of their treaty annuities promised under the Treaty of Chicago and all other cession treaties. By the Act of June 25, 1864 (13 Stat. 172), the Congress declared that the Wisconsin Band did not forfeit their annuities by not removing and directed that the share of the Pottawatomi Indians who had refused to relocate to the west should be retained for their use in the United States Treasury. (H.R. Rep. No. 470, 64th Cong., p. 5, as quoted on page 3 of memo dated October 7, 1949). Nevertheless, much of the money was never paid to the Wisconsin Band.

In 1903, the Wisconsin Band—most of whom now resided in three areas, the States of Michigan and Wisconsin and the Province of Ontario—petitioned the Senate once again to pay them their fair portion on annuities as required by the law and treaties. (Sen. Doc. No. 185, 57th Cong., 2d Sess.) By the Act of June 21, 1906 (34 Stat. 380), the Congress directed the Secretary of the Interior to investigate claims made by the Wisconsin Band and make a roll of the Wisconsin Band Pottawatomis that still remained in the East. Dr. W.M. Wooster enumerated the Wisconsin Band Pottawatomi in both the United States and Canada, documenting 2,007 Wisconsin Pottawatomis—457 in Wisconsin and Michigan and 1,550 in Canada. He also concluded that the proportionate share of annuities for the Pottawatomis in Wisconsin and Michigan was $477,339 and that the proportionate share of annuities due the Pottawatomi Nation in Canada was $1,517,226. The Congress thereafter enacted a series of appropriation Acts from June 30, 1913 to May 29, 1928 to satisfy most of money owed to those Wisconsin Band Pottawatomis residing in the United States. However, the Wisconsin Band Pottawatomis who resided in Canada were never paid their share of the tribal funds.

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Since that time, the Pottawatomi Nation in Canada has diligently and continuously sought to enforce their treaty rights, although until this congressional reference, they had never been provided their day in court.

Procedural Background

On October 4, 1994, the United States Senate passed Resolution No. 223 which essentially conferred on the Court of Federal Claims the jurisdiction to entertain all claims that would have been compensable to the Pottawatomi Nation of Canada under the Indian Claims Commission Act, Pub. L. No 726, ch. 959, 60 Stat. 1049.

On May 22, 2000, the Pottawatomi Nation of Canada and the United States executed a *Stipulation for Recommendation of Settlement Agreement* with the court. Through this settlement stipulation, the U.S. Department of Justice and the Department of the Interior agreed that it would be "fair, just and equitable" to settle the claims of the Pottawatomi Nation in Canada for the sum of $1,830,000. This settlement amount was reached by the parties after seven years of extensive, fact-intensive litigation. On September 15, 2000, the Hearing Officer approved the document, concluding in her opinion

> . . . that payment of the $1.83 million settlement is not a gratuity because 1) significant risks of litigation exist for both parties, which are being compromised; 2) the parties adopted the Hearing Officer's recommended amount; and 3) that recommendation was based on the an analysis of hundreds of historical documents, treaties, statutes and case law. The amount and terms of settlement are predicated on a credible legal claim, and the settlement amount and terms are in the interests of justice.

(Attachment F at 28). On December 11, 2000, the three judge review panel issued a report agreeing with the Hearing Officer's analysis and recommending "that legislation be enacted awarding the Pottawatomi Nation in Canada the sum of $1,830,000, the payment of which is to be made in strict accordance with the terms of the parties' proposed settlement. . . ." (Attachment H at 2-3).

Conclusion

The Pottawatomi Nation in Canada has sought justice for over 150 years. They have done all that the federal government has asked in order to establish their claim. S. 60 will not correct all the wrongs of the past, but it is a demonstration that the United States is willing to admit when it has left an obligation unfulfilled and it is willing to do what we can to see that justice—so long delayed—is not now denied.

Finally, it should be noted that the claim of the Pottawatomi Nation in Canada is supported by the National Congress of American Indians (the oldest, largest and most-representative tribal organization here in the United States), the Assembly of First Nations (which includes all recognized tribal entities in Canada), and each of the Pottawatomi tribal groups that remain in the United States today.

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Pottawatomi Nation in Canada

Timeline of Events

1795 – 1832	Historic Pottawatomi Nation enters into a series of 19 treaties with the United States ceding title to vast sections of land in present-day Ohio, Michigan, Indiana, Illinois, and Wisconsin
1833	Historic Pottawatomi Nation and U.S. Treaty Commissioners sign the Treaty of Chicago ceding the last of their traditional lands (5 million acres) in return for lands in Missouri, various monetary considerations, and annuities
1834	U.S. Senate refuses to ratify the Treaty of Chicago unless Pottawatomi agree to less desirable lands in Iowa; all but 7 of 77 original signatories refuse to accept change; U.S. Senate unilaterally amends and ratifies Treaty of Chicago
1836	Federal troops and mercenaries begin to forcefully remove Pottawatomi; Wisconsin Band of Pottawatomi resist removal and many fled to Canada
1864	Congress declares Wisconsin Band did not forfeit their annuities by resisting removal and its share should still be retained in U.S. Treasury (34 Stat. 380)
1890 – 1893	Pottawatomi in Indiana and Michigan petition Congress to pay their share of annuities under Treaty of Chicago; Congress directs petition to the U.S. Claims Court which finds in favor of Tribes; Congress appropriates funds
1903-1906	Wisconsin Band of Pottawatomi petition Congress for their share of annuities under the Treaty of Chicago; Congress directs Secretary of the Interior to determine the amount and status of annuity payments to the Wisconsin Band
1908	Wooster Report presented to Congress by the Secretary of the Interior states: $447,399.00 owed to the Pottawatomi in Wisconsin $1,517,226.00 owed to the Pottawatomi in Canada ***"The fact of their residence in a foreign country is held not to affect their right to enrollment with the Pottawatomi of Wisconsin for the purposes of the act. . . ."***
1913-1928	Congress enacts series of appropriation acts to satisfy most of the money owed to Wisconsin Band of Pottawatomi residing in United States; no funds were appropriated for Wisconsin Band of Pottawatomi residing in Canada
1948	Wisconsin Band of Pottawatomi and the Pottawatomi Nation in Canada file claims with the Indian Claims Commission for payment of annuities
1983	The U.S. Court of Claims awards a judgment in favor of the Wisconsin Band of Pottawatomi (those residing in United States), but expressly excludes the Pottawatomi Nation in Canada based on jurisdictional limitations under ICCA
1990	Pottawatomi Nation in Canada files suit in U.S. Court of Federal Claims seeking payment of unpaid treaty annuities under the Treaty of Chicago; court dismisses based on six-year statute of limitations
1994	Senator Daniel Inouye of Hawaii and Senator Paul Simon of Illinois introduce S. Res. 223 and S. 2188, a private relief bill—both were passed by the Senate and referred to the Court of Federal Claims
2000	Pottawatomi Nation in Canada and United States executed a *Stipulation for Recommendation of Settlement Agreement* approved by the Court of Federal Claims for $1.83 million—the U.S. Department of Justice and Department of the Interior both agreed that the agreement was "fair, just and equitable"
????	The United States Congress authorizes payment to the Pottawatomi Nation in Canada pursuant to the *Stipulation for Recommendation of Settlement Agreement* as approved by the Court of Federal Claims

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II

112TH CONGRESS
1ST SESSION

S. 60

To provide relief to the Pottawatomi Nation in Canada for settlement of certain claims against the United States.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 5), 2011

Mr. INOUYE introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide relief to the Pottawatomi Nation in Canada for settlement of certain claims against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SETTLEMENT OF CERTAIN CLAIMS.

(a) AUTHORIZATION FOR PAYMENT.—Notwithstanding any other provision of law, subject to subsection (b), the Secretary of the Treasury shall pay to the Pottawatomi Nation in Canada $1,830,000 from amounts appropriated under section 1304 of title 31, United States Code.

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(b) PAYMENT IN ACCORDANCE WITH STIPULATION FOR RECOMMENDATION OF SETTLEMENT.—The payment under subsection (a) shall—

(1) be made in accordance with the terms and conditions of the Stipulation for Recommendation of Settlement dated May 22, 2000, entered into between the Pottawatomi Nation in Canada and the United States (referred to in this section as the "Stipulation for Recommendation of Settlement"); and

(2) be included in the report of the Chief Judge of the United States Court of Federal Claims regarding Congressional Reference No. 94–1037X, submitted to the Senate on January 4, 2001, in accordance with sections 1492 and 2509 of title 28, United States Code.

(c) FULL SATISFACTION OF CLAIMS.—The payment under subsection (a) shall be in full satisfaction of all claims of the Pottawatomi Nation in Canada against the United States that are referred to or described in the Stipulation for Recommendation of Settlement.

(d) NONAPPLICABILITY.—Notwithstanding any other provision of law, the Indian Tribal Judgment Funds Use

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or Distribution Act (25 U.S.C. 1401 et seq.) does not apply to the payment under subsection (a).

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Marriage, Opportunity, Relief, and Empowerment Act of 2005, which the Senate leadership introduced, also included the proposal.

As the Senate Finance Committee's hearings show, substantial health needs would go unmet if not for our charitable hospitals. It is time for the Congress to assist the Nation's teaching hospitals in their charitable, educational service.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 59

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. TREATMENT OF CERTAIN HOSPITAL SUPPORT ORGANIZATIONS AS QUALIFIED ORGANIZATIONS FOR PURPOSES OF DETERMINING ACQUISITION INDEBTEDNESS.

(a) IN GENERAL.—Subparagraph (C) of section 514(c)(9) of the Internal Revenue Code of 1986 (relating to real property acquired by a qualified organization) is amended by striking "or" at the end of clause (iii), by striking the period at the end of clause (iv) and inserting "; or", and by adding at the end the following new clause:

"(v) a qualified hospital support organization (as defined in subparagraph (I)).".

(b) QUALIFIED HOSPITAL SUPPORT ORGANIZATIONS.—Paragraph (9) of section 514(c) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:

"(I) QUALIFIED HOSPITAL SUPPORT ORGANIZATIONS.—For purposes of subparagraph (C)(iv), the term 'qualified hospital support organization' means, with respect to any eligible indebtedness (including any qualified refinancing of such eligible indebtedness), a support organization (as defined in section 509(a)(3)) which supports a hospital described in section 119(d)(4)(B) and with respect to which—

"(i) more than half of its assets (by value) at any time since its organization—

"(I) were acquired, directly or indirectly, by testamentary gift or devise, and

"(II) consisted of real property, and

"(ii) the fair market value of the organization's real estate acquired, directly or indirectly, by gift or devise, exceeded 25 percent of the fair market value of all investment assets held by the organization immediately prior to the time that the eligible indebtedness was incurred.

For purposes of this subparagraph, the term 'eligible indebtedness' means indebtedness secured by real property acquired by the organization, directly or indirectly, by gift or devise, the proceeds of which are used exclusively to acquire any leasehold interest in such real property or for improvements on, or repairs to, such real property. A determination under clauses (i) and (ii) of this subparagraph shall be made each time such an eligible indebtedness (or the qualified refinancing of such an eligible indebtedness) is incurred. For purposes of this subparagraph, a refinancing of such an eligible indebtedness shall be considered qualified if such refinancing does not exceed the amount of the refinanced eligible indebtedness immediately before the refinancing.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to indebtedness incurred on or after the date of the enactment of this Act

By Mr. INOUYE:

S. 60. A bill to provide relief to the Pottawatomi Nation in Canada for settlement of certain claims against the United States; to the Committee on the Judiciary.

Mr. INOUYE. Mr. President, nearly 16 years ago I stood before you to introduce a bill "to provide an opportunity for the Pottawatomi Nation in Canada to have the merits of their claims against the United States determined by the United States Court of Federal Claims."

That bill was introduced as Senate Resolution 223, which referred the Pottawatomi's claim to the Chief Judge of the U.S. Court of Federal Claims and required the Chief Judge to report back to the Senate and provide sufficient findings of fact and conclusions of law to enable the Congress to determine whether the claim of the Pottawatomi Nation in Canada is legal or equitable in nature, and the amount of damages, if any, which may be legally or equitably due from the United States.

Over a decade ago, the Chief Judge of the Court of Federal Claims reported back that the Pottawatomi Nation in Canada has a legitimate and credible legal claim. Thereafter, by settlement stipulation, the United States has taken the position that it would be "fair, just and equitable" to settle the claims of the

ottawatomi Nation in Canada for the sum of $1,830,000. This settlement amount was reached by the parties after seven years of extensive, fact-intensive litigation. Independently, the court concluded that the settlement amount is "not a gratuity" and that the "settlement was predicated on a credible legal claim." *Pottawatomi Nation in Canada, et al.* v. *United States*, Cong. Ref. 94-1037X at 28, Ct. Fed. Cl., September 15, 2000, Report of Hearing Officer.

The bill I introduce today is to authorize the appropriation of those funds that the United States has concluded would be "fair, just and equitable" to satisfy this legal claim. If enacted, this bill will finally achieve a measure of justice for a tribal nation that has for far too long been denied.

For the information of our colleagues, this is the historical background that informs the underlying legal claim of the Canadian Pottawatomi.

The members of the Pottawatomi Nation in Canada are one of the descendant groups—successors-in-interest—of the historical Pottawatomi Nation and their claim originates in the latter part of the 18th century. The historical Pottawatomi Nation was aboriginal to the United States. They occupied and possessed a vast expanse in what is now the States of Ohio, Michigan, Indiana, Illinois, and Wisconsin. From 1795 to 1833, the United States annexed most of the traditional land of the Pottawatomi Nation through a series of treaties of cession—many of these cessions were made under extreme duress and the threat of military action. In exchange, the Pottawatomi were repeatedly made promises that the remainder of their lands would be secure and, in addition, that the United States would pay certain annuities to the Pottawatomi.

In 1829, the United States formally adopted a Federal the policy of removal; an effort to remove all Indian tribes from their traditional lands east of the Mississippi River to the west. As part of that effort, the government increasingly pressured the Pottawatomi to cede the remainder of their traditional lands, some five million acres in and around the city of Chicago, and remove their nation west. For years, the Pottawatomi steadfastly refused to cede the remainder of their tribal territory. Then in 1833, the United States, pressed by settlers seeking more land, sent a Treaty Commission to the Pottawatomi with orders to extract a cession of the remaining lands. The Treaty Commissioners spent 2 weeks using extraordinarily coercive tactics—including threats of war—in an attempt to get the Pottawatomi to agree to cede their territory. Finally, those Pottawatomi who were present relented and on September 26, 1933, they ceded their remaining tribal estate through what would be known as the Treaty of Chicago. Seventy-seven members of the Pottawatomi Nation signed the Treaty of Chicago. Members of the "Wisconsin Band" were not present and did not assent to the cession.

In exchange for their land, the Treaty of Chicago provided that the United States would give to the Pottawatomi 5 million acres of comparable land in what is now Missouri. The Pottawatomi were familiar with the Missouri land, aware that it was similar to their homeland. However, the Senate refused to ratify that negotiated agreement and unilaterally switched the land to five million acres in Iowa. The Treaty Commissioners were sent back to acquire Pottawatomi assent to the Iowa land. All but seven of the original 77 signatories refused to accept the change even with promises that if they were dissatisfied "justice would be done."

Nevertheless, the Treaty of Chicago was ratified as amended by the Senate in 1834. Subsequently, the Pottawatomi sent a delegation to evaluate the land in Iowa. The delegation reported back that the land was "not fit for snakes to live on."

While some Pottawatomi moved westward, many of the Pottawatomi, particularly the Wisconsin Band, whose leaders never agreed to the Treaty, refused to do so. By 1836, the United States began to forcefully remove Pottawatomi who remained in the east with devastating consequences. As is true with many other American Indian tribes, the forced removal westward came at great human cost. Many of the Pottawatomi were forcefully removed

by mercenaries who were paid on a per capita basis government contract. Over one-half of the Indians removed by these means died en route. Those who reached Iowa were almost immediately removed further to inhospitable parts of Kansas against their will and without their consent.

After learning of these conditions, many of the Pottawatomi, including most of the Wisconsin Band, vigorously resisted forced removal. To avoid Federal troops and mercenaries, much of the Wisconsin Band ultimately found it necessary to flee to Canada. They were often pursued to the border by government troops, government-paid mercenaries or both. Official files of the Canadian and United States governments disclose that many Pottawatomi were forced to leave their homes without their horses or any of their possessions other than the clothes on their backs.

By the late 1830s, the government refused payment of annuities to any Pottawatomi groups that had not removed west. In the 1860s, members of the Wisconsin Band—those still in their traditional territory and those forced to flee to Canada—petitioned Congress for the payment of their treaty annuities promised under the Treaty of Chicago and all other cession treaties. By the Act of June 25, 1864, 13 Stat. 172, Congress declared that the Wisconsin Band did not forfeit their annuities by not removing and directed that the share of the Pottawatomi Indians who had refused to relocate to the west should be retained for their use in the United States Treasury. H.R. Rep. No. 470, 64th Cong., p. 5, as quoted on page 3 of memo dated October 7, 1949. Nevertheless, much of the money was never paid to the Wisconsin Band.

In 1903, the Wisconsin Band—most of whom now resided in three areas, the States of Michigan and Wisconsin and the Province of Ontario—petitioned the Senate once again to pay them their fair portion of annuities as required by the law and treaties, Sen. Doc. No. 185, 57th Cong., 2d Sess. By the act of June 21, 1906, 34 Stat. 380, Congress directed the Secretary of the Interior to investigate claims made by the Wisconsin Band and establish a roll of the Wisconsin Band Pottawatomi that still remained in the east. In addition, Congress ordered the Secretary to determine "the [Wisconsin Bands] proportionate shares of the annuities, trust funds, and other moneys paid to or expended for the tribe to which they belong in which the claimant Indians have not shared, [and] the amount of such monies retained in the Treasury of the United States to the credit of the clamant Indians as directed the provision of the Act of June 25, 1864."

In order to carry out the 1906 Act, the Secretary of Interior directed Dr. W.M. Wooster to conduct an enumeration of Wisconsin Band Pottawatomi in both the United States and Canada. Dr. Wooster documented 2,007 Wisconsin Pottawatomi: 457 in Wisconsin and Michigan and 1,550 in Canada. He also concluded that the proportionate share of annuities for the Pottawatomi in Wisconsin and Michigan was $477,339 and that the proportionate share of annuities due the Pottawatomi Nation in Canada was $1,517,226. Congress thereafter enacted a series of appropriation Acts from June 30, 1913 to May 29, 1928 to satisfy most of the money owed to those Wisconsin Band Pottawatomi residing in the United States. However, the Wisconsin Band Pottawatomi who resided in Canada were never paid their share of the tribal funds.

Since that time, the Pottawatomi Nation in Canada has diligently and continuously sought to enforce their treaty rights, although until this Congressional reference, they had never been provided their day in court. In 1910, the United States and Great Britain entered into an agreement for the purpose of dealing with claims between both countries, including claims of Indian tribes within their respective jurisdictions, by creating the Pecuniary Claims Tribunal. From 1910 to 1938, the Pottawatomi Nation in Canada diligently sought to have their claim heard in this international forum. Overlooked for more pressing international matters of the period, including the intervention of World War I, the Pottawatomi then came to the U.S. Congress for redress of their claim.

In 1946, the Congress waived its sovereign immunity and established the Indian Claims Commission for the purpose of granting tribes their long-delayed day in court. The Indian Claims Commission Act, ICCA, granted the Commission jurisdiction over claims such as the type involved here. In 1948, the Wisconsin Band Pottawatomi from both sides of the border brought suit together in the Indian Claims Commission for recovery of damages. *Hannahville Indian Community* v. *U.S.*, No. 28 (Ind. Cl. Comm. Filed May 4, 1948). Unfortunately, the Indian Claims Commission dismissed Pottawatomi Nation in Canada's part of the claim ruling that the Commission had no jurisdiction to consider claims of Indians living outside territorial limits of the United States. *Hannahville Indian Community* v. *U.S.*, 115 Ct. Cl. 823, 1950. The claim of the Wisconsin Band residing in the United States that was filed in the Indian Claims Commission was finally decided in favor of the Wisconsin Band by the U.S. Claims Court in 1983. *Hannahville Indian Community* v. *United States*, 4 Ct. Cl. 445, 1983. The Court of Claims concluded that the Wisconsin Band was owed a member's proportionate share of unpaid annuities from 1838 through 1907 due under various treaties, including the Treaty of Chicago and entered judgment for the American Wisconsin Band Pottawatomi for any monies not paid. Still the Pottawatomi Nation in Canada was excluded because of the jurisdictional limits of the ICCA.

Undaunted, the Pottawatomi Nation in Canada came to the Senate, and after careful consideration, we finally gave them their long-awaited day in court through the Congressional reference process. The court has now reported back to us that their claim is meritorious and that the payment that this bill would make constitutes a "fair, just and equitable" resolution to this claim.

The Pottawatomi Nation in Canada has sought justice for over 150 years. They have done all that we asked in order to establish their claim. Now it is time for us to finally live up to the promise our government made so many years ago. It will not correct all the wrongs of the past, but it is a demonstration that this government is willing to admit when it has left an unfulfilled obligation, and that the United States is willing to do what we can to see that justice, so long delayed, is not now denied.

Finally, I would just note that the claim of the Pottawatomi Nation in Canada is supported through specific resolutions by the National Congress of American Indians, the oldest, largest and most-representative tribal organization here in the United States, the Assembly of First Nations, which includes all recognized tribal entities in Canada, and each and every of the Pottawatomi tribal groups that remain in the United States today.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 60

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SETTLEMENT OF CERTAIN CLAIMS.

(a) AUTHORIZATION FOR PAYMENT.—Notwithstanding any other provision of law, subject to subsection (b), the Secretary of the Treasury shall pay to the Pottawatomi Nation in Canada $1,630,000 from amounts appropriated under section 1304 of title 31, United States Code.

(b) PAYMENT IN ACCORDANCE WITH STIPULATION FOR RECOMMENDATION OF SETTLEMENT.—The payment under subsection (a) shall—

(1) be made in accordance with the terms and conditions of the Stipulation for Recommendation of Settlement dated May 22, 2000, entered into between the Pottawatomi Nation in Canada and the United States (referred to in this section as the "Stipulation for Recommendation of Settlement"); and

(2) be included in the report of the Chief Judge of the United States Court of Federal Claims regarding Congressional Reference No. 94-1037X, submitted to the Senate on January 4, 2001, in accordance with sections 1492 and 2509 of title 28, United States Code.

(c) FULL SATISFACTION OF CLAIMS.—The payment under subsection (a) shall be in full satisfaction of all claims of the Pottawatomi Nation in Canada against the United States that are referred to or described in the Stipulation for Recommendation of Settlement.

(d) NONAPPLICABILITY.—Notwithstanding any other provision of law, the Indian Tribal Judgment Funds Use or Distribution Act (25 U.S.C. 1401 et seq.) does not apply to the payment under subsection (a).

By Mr. INOUYE (for himself, Ms. MURKOWSKI, and Mr. BEGICH):

The National Congress of American Indians
Resolution #SAC-06-003

TITLE: Support for Passage of Legislation Approving the Settlement Agreement between the Keewatinosagiganing Pottawatomi Nation in Canada and the United States as Recommended by the Chief Judge of the U.S. Court of Federal Claims Pursuant to the Congressional Reference Process

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the NCAI adopted a resolution at the 1993 Annual Convention reaffirming its 1990 action supporting the Keewatinosagiganing Pottawatomi Nation in Canada in its efforts to seek a fair and equitable forum to have its treaty claims against the United States considered and resolved; and

WHEREAS, the Senate passed S. Res. 223, 103rd Cong., 2d Sess. (1994) (enacted), referring the treaty claim of the Keewatinosagiganing Pottawatomi Nation in Canada to the Chief Judge of the United States Court of Federal Claims, who assigned the case to the Honorable Christine Odelle Cook Miller as Hearing Officer for recommendation on the Tribe's claim pursuant to 28 U.S.C. §§ 1492 and 2509; and

WHEREAS, the NCAI adopted a resolution at the 1999 Mid-Year Convention reaffirming its 1993 action and supporting the proposed settlement agreement between the Keewatinosagiganing Pottawatomi Nation in Canada and the United States for the sum of two million dollars as fair, just and equitable relief; and

WHEREAS, after seven years of extensive, fact-intensive litigation, on May 22, 2000, the Keewatinosagiganing Pottawatomi Nation in Canada and the United States Department of Justice executed a final *Stipulation for Recommendation of Settlement Agreement* with the court for the sum of $1,830,000; and

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WHEREAS, on September 15, 2000, the Hearing Officer approved the settlement agreement, recognizing that "the amount and terms of settlement are predicated on a credible legal claim, and the settlement amount and terms are in the interests of justice;" and

WHEREAS, on December 11, 2000, a three-judge Review Panel issued a report agreeing with the Hearing Officer's analysis and recommended "that legislation be enacted awarding the Keewatinosagiganing Pottawatomi Nation in Canada the sum of $1,830,000" which was certified and forwarded by the Chief Judge of the U.S. Court of Federal Claims to the Secretary of the U.S. Senate on January 4, 2001.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby affirm its support for passage of legislation by Congress approving and implementing the settlement agreement between the Keewatinosagiganing Pottawatomi Nation in Canada and the United States as recommended by the Hearing Officer, the Review Panel and the Chief Judge of the U.S. Court of Federal Claims as a fair, just and equitable resolution of the treaty claim; and

BE IT FURTHER RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2006 63rd Annual Session of the National Congress of American Indians, held at the Sacramento Convention Center in Sacramento, California on October 1-6, 2006, with a quorum present.

President

ATTEST:

Recording Secretary

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POTAWATOMI NATIONS

RESOLUTION NO. 2000-02

WHEREAS, Prior to the arrival of Europeans, the Pottawatomi Nation constituted a distinct people with a distinctive language and culture with aboriginal settlements surrounding the Great Lakes region and held title, either singly or jointly, to portions of the territory now known as Ohio, Indiana, Illinois, Michigan, and Wisconsin.

WHEREAS, After the Treaty of Chicago in 1833, a great diaspora of the Pottawatomi Nation into several "bands" occurred with thousands of members moving to the West and an estimated 2,500 Pottawatomi fleeing to the territory now known as the Province of Ontario, Canada to avoid the coerced removal policy of the United States.

WHEREAS, Efforts to reunite the various Pottawatomi bands "to again become one people, and receive their annuities and other benefits in common..." in the Treaty of June 5 & 17, 1846 (9 Stat. 853) failed.

WHEREAS, Members of the Pottawatomi Nation in Canada, also known as the *Keewatinosagiganing* Pottawatomi, (translated as "Northern Lakes" Pottawatomi), are among the descendants and successors in interest of the Pottawatomi Nation.

WHEREAS, Members of the Pottawatomi Nation in Canada, also known as the *Keewatinosagiganing* Pottawatomi were precluded from joining in claims brought by the various bands of the Pottawatomi Nation under the Indian Claims Commission Act, (Act of August 13, 1946, ch. 959, ? 2, 60 Stat. 1049, 1050 (formerly codified at 25 U.S.C. ? 70a (1970)).

WHEREAS, The United States Senate has referred the claims of the Pottawatomi Nation in Canada, under the Indian Claims Commission, to the United Staets Court of Federal Claims pursuant to the terms of S.Res 223, 103rd Congress, 2d Sess., October 4, 1994.

THEREFORE BE IT RESOLVED, that the Hannahville Indian Community of Michigan, the Forest County Potawatomi Community of Wisconsin, the Prairie Band of Potawatomi Indians of Kansas, the Citizen Potawatomi Indian Tribe of Oklahoma, the Pokagon Band of Potawatomi Indians of Michigan, the Nottawaseppi Huron Band of Potawatomi of Michigan, and the Match-E-Be-Nash-She-Wish Band of Potawatomi of Michigan, whose members are also among the descendants of the same Pottawatomi Nation and have

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been recognized by the United States as American Indian tribes eligible to receive services from the Secretary of the Interior, now recognize the Pottawatomi Nation in Canada as being a part of the Pottawatomi Nation, whose ancestors formerly resided in what is now the United States;

BE IT FURTHER RESOLVED, that we recognize the elected Executive Council of the Pottawatomi Nation in Canada as the official government that represents the members of the Pottawatomi Nation, who reside in the Province of Ontario, Canada;

BE IT FURTHER RESOLVED, that the Pottawatomi Nation supports the Pottawatomi Nation in Canada and urges the United States to resolve this historic claim first reported to Congress by the Secretary of the Interior in H.R. Doc. No. 830, 60th Cong., 1st Sess. (1908).

CERTIFICATION

The foregoing Resolution was duly adopted this date, July 29, 2000, at a meeting of the Potawatomi Nations which was held on the Forest County Potawatomi Reserve in Wisconsin.

the Hannahville Indian Community of Michigan,

the Forest County Potawatomi Community of Wisconsin,

the Prairie Band of Potawatomi Indians of Kansas,

the Citizen Potawatomi ~~Indian Tribe of Oklahoma~~ NATION

the Pokagon Band of Potawatomi Indians of Michigan,

the Nottawaseppi Huron Band of Potawatomi (A.K.A. HPI),

the Match-E-Be-Nash-She-Wish Band of Potawatomi, and

the Keewatinosagiganing Potawatomi of Canada

A resolution

dopted by The City Council
of the City of Chicago, Illinois

Presented by ALDERMAN HELEN SHILLER on JULY 31 1990

Whereas, The most historically influential tribe to occupy the region about Chicago and Northern Illinois was the Pottawatomi; and

WHEREAS, The present Pottawatomi residing in the United States and Canada are descendants of the Pottawatomi Nation which originally held sovereignty over portions of what are now the states of Illinois, Wisconsin, Indiana, Michigan and Ohio; and

WHEREAS, Between 1795 and 1833, 12 treaties were made with the United States which ceded large areas of land. As part of the treaties, the United States agreed to give the Pottawatomi Nation petual annual payments to all members of their Nation; and

WHEREAS, Because of the different land cessions, by 1830, the Pottawatomi Nation had been divided into a number of bands occupying defined areas of their original lands; and

WHEREAS, By a treaty concluded September 26, 1833 at what is now the City of Chicago, the Pottawatomi Nation ceded all their remaining lands along the western shore of Lake Michigan to the United States in return for new reservation land west of the Mississippi; and

WHEREAS, About 2,000 - 3,000 Pottawatomi of the Wisconsin band refused to sign the 1833 treaty and fled into Ontario in an attempt to avoid forced removal west of the Mississippi by the United States Government; and

WHEREAS, The Pottawatomi Nation in Canada has been denied settlement of their treaty entitlement claims by the United States Government because they no longer reside in the United States; and

WHEREAS, All other portions of the Pottawatomi Nation still living in the United States have had their claims settled; and

AGE II

WHEREAS, The Chicago City Council has acknowledged the Pottawatomi Indian Tribe as the first settlers of the area now known as Chicago; and

Therefore Now Be It Resolved, That the Mayor and the City Council memorialize the United States Congress to introduce and pass a jurisdictional statute allowing the Court of Claims to consider the claim of the Pottawatomi in Canada.

Richard M. Daley
MAYOR

Walter S. Kozubowski
CITY CLERK

In the United States Court of Federal Claims

CONGRESSIONAL REFERENCE
to the
UNITED STATES COURT OF FEDERAL CLAIMS

POTTAWATOMI NATION IN CANADA, for and on behalf of its members, and as *parens patriae* for its members, and Edward Williams, Chairman of the Executive Council of the Pottawatomi Nation in Canada, Cynthia Wesley-Esquimaux, Vice-Chair of the Executive Council, Stewart King, Executive Council member, Frank Shawbedees, Executive Council member, on their behalf and on behalf of members of the Pottawatomi Nation in Canada,	*	Cong. Ref. No. 94-1037X (Filed Sept. 15, 2000)
Plaintiffs,	*	
v.	*	
THE UNITED STATES,	*	
Defendant.	*	

Keith M. Harper, Washington, DC, for plaintiffs. James K Kawahara, Native American Rights Fund, of counsel.

Andrew M. Eschen, Washington, DC, with whom was Assistant Attorney General, Lois J. Schiffer, for defendant. Sandra Ashton, Department of the Interior, of counsel.

REPORT OF HEARING OFFICER

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MILLER, Hearing Officer.

BACKGROUND

This matter comes to the United States Court of Federal Claims as a referral from the Senate pursuant to 28 U.S.C. § 2509 (1994). Jurisdiction is grounded on 28 U.S.C. § 1492 (1994). By Senate Resolution 223, the Senate referred S. 2188, 103d Cong. (1994), entitled "A bill [f]or the relief of the Pottawatomi Nation in Canada for the proportionate share of tribal funds and annuities under treaties between the Pottawatomi Nation and the United States, and for other purposes," to the Chief Judge of the United States Court of Federal Claims. The Pottawatomi Nation in Canada for and on behalf of its members, the Chairman of the Executive Council, and other officials ("plaintiffs") filed their complaint on February 27, 1995.

The complaint pleads claims based principally on violation of the Treaty with the Chippewa, Ottowa, and Potawatamie, Sept. 26, 1833, 7 Stat. 431 (the "Treaty of Chicago"), involving Pottawatomi 1/ residing in Michigan, Illinois, and Wisconsin, as well as other treaties involving Pottawatomi residing in Michigan and Indiana, all of which were entered into after the 1795 Treaty of Greenville. Seeking an accounting and money damages, plaintiffs presented claims for the failure to fulfill treaty obligations, for an accounting of treaty annuities and funds management and disbursements, revision of treaties on the basis of unconscionable consideration and duress, a taking under the Fifth Amendment to the U.S. Constitution, a breach of fiduciary duty, and the failure to deal fairly and honorably.

The Hearing Officer is charged with finding facts, "including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy." 28 U.S.C. § 2509(c); see RCFC App. D ¶ 8. On June 18, 1997, the court entered an order suspending the case because the parties had agreed in principle to a settlement, whereby Congress would authorize payment of a sum in full satisfaction of plaintiffs' claims and plaintiffs would finance, initiate, and assume responsibility for a class action in Canada to assure that anyone with conceivable claims as a Pottawatomi residing in Canada would be bound to the distribution, and the United States thus would be insulated from future claims. The parties continued to negotiate this matter and ultimately agree to a settlement in principle for the sum of $1,830,000. Before the settlement could be accepted by the principals for the parties, however, substantial effort was required to coordinate the satellite litigation in Canada that would implement portions of the parties' agreement. On

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1/ The records disclose many different spellings for the Pottawatomi. Depending on the period, the Pottawatomi spelled their English name differently.

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April 18, 2000, the parties submitted to the Hearing Officer a Stipulation for Recommendation of Settlement embodying the complex agreement that they had concluded. The parties requested that the Hearing Officer approve the document before signing. At an informal status conference with the parties held on April 25, 2000, the court approved the form and content. [[The signed agreement was submitted to the Hearing Officer on May 23, 2000. It is attached to this report and incorporated by reference.]] [[Original is dated May 22, 2000]]

As will be discussed, the matters that the parties agreed to litigate first were the pivotal factual and legal questions that would govern the outcome of this litigation. Although the Hearing Officer became thoroughly acquainted with the evidence relating to those contentions, the parties requested that the Hearing Officer render findings and conclusions that did not reflect that either party's version of the facts prevailed, which would negate an underpinning of the settlement. Thus, the focus of this report is to distill 1) the history of the litigation; 2) the involvement and role of the Hearing Officer as an independent fact finder in settling plaintiffs' claims; and 3) an analysis of the parties' positions under the applicable legal standards. The analysis of these subjects forms the basis of the Hearing Officer's findings and conclusion, made solely in aid of this settlement, that the claims advanced by the Pottawatomi is a credible legal claim and not a gratuity; that the amount agreed upon by the parties in the circumstances can be regarded as the proper amount due from the United States; and that the procedures agreed upon by the parties to implement the settlement are reasonable.

FACTS

The parties have requested that the Hearing Officer incorporate paragraphs 8-20 of their agreement as findings of fact. The Hearing Officer, after an independent review of the record, finds this statement of facts to be accurate and incorporates it with minor modifications. The Hearing Officer also elaborates on these facts in discussing the law as applied to them.

The Pottawatomi Nation in Canada seeks compensation from the United States for alleged breach of fiduciary and statutory duties arising from a series of treaties between 1795 and 1846. By these treaties the United States agreed to make payments, some in perpetuity, and furnish other consideration to the members of the Pottawatomi Nation residing in the United States. In return the Pottawatomi ceded title and aboriginal rights to vast amounts of land surrounding the Great Lakes region, including land in Indiana, Ohio, Illinois, Wisconsin, and Michigan, and defendant contends that the Pottawatomi Nation agreed to remove west of the Mississippi River to tracts of land set aside by the United States for their use and benefit. After signing the Treaty of Chicago, see 7 Stat. at 431, the United States Senate would not consent to ratification until the land promised by the Treaty Commissioners

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to the Pottawatomi in Missouri was switched to other lands in Iowa that were more acceptable to the Senate. The Treaty of Chicago was the last treaty of cession, whereby the United States restated and acknowledged its obligation under the earlier treaties with the Pottawatomi and also sought to annex the remaining Pottawatomi tribal estate surrounding Lake Michigan.

Plaintiffs base their claim to compensation as the alleged descendants and successors-in-interest of American Pottawatomi who moved to Canada during various periods after concluding treaties of cession. Plaintiffs' alleged ancestors, who were part of a group known as the "Wisconsin Band of Pottawatomis" (the "Wisconsin Band"), did not move west after the Treaty of Chicago. The Wisconsin Band did not receive treaty annuities from the United States after 1838 because federal authorities stopped distributing funds to those Pottawatomi who refused to move west of the Mississippi River and to those who moved to Canada.

After 1838 the Commissioner of Indian Affairs suggested that the Wisconsin Band may have forfeited its annuities by not moving. Congress, however, appropriated $10,000.00 for the Wisconsin Band in 1864. The United States Treasury was directed to maintain the unpaid annuities for the Wisconsin Band's credit until it moved west. See Hannahville Indian Community v. United States, 4 Cl. Ct. 445 (1983), aff'd, 732 F.2d 167 (Fed. Cir.) (table), cert. denied, 469 U.S. 824 (1984).

The Wisconsin Band petitioned Congress for its unpaid annuities in 1903. Congress instructed the Secretary of the Interior to investigate the claims and identify the amount retained in the Treasury to the Wisconsin Band's credit pursuant to the Act of June 25, 1864, 13 Stat. 161, 169 (1864) (the "1864 Act"). If none were retained, the Secretary was to determine the amount that should have been retained. See Hannahville Indian Community, 4 Cl. Ct. at 459.

In 1908 the Secretary of the Interior reported back to Congress. See W.M. Wooster, Report of Investigation of Claims of Pottawatomie Indians of Wisconsin, H.R. Doc. No. 830 (1908) (the "Wooster Report"). In preparing the Wooster Report, the Indian Affairs Office ordered Dr. W.M. Wooster, Clerk and Special Disbursing Agent, to conduct a census of the Wisconsin Band, including those members who may have been residing in Canada at the time. Among others, the following instruction was given: "The fact of their residence in a foreign country is held not to affect their right to enrollment with the Pottawatomies of Wisconsin for the purposes of the act under which the roll is to be prepared." H.R. Doc. No. 830, at 20.

In the Wooster Report, the Secretary of the Interior reported that "[t]hese rolls are believed by the Commissioner of Indian Affairs to be as nearly correct and complete as it is practicable to make them. Of the total number enrolled 457 reside in Wisconsin and

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Michigan and 1550 in the Dominion of Canada." H.R. Doc. No. 830, at 6. The Secretary also concluded that the proportionate share of the unpaid annuities of the Wisconsin Band, including those residing in Canada, for the period between 1838 and 1907, would have been $1,964,565.87. See H.R. Doc. No. 830, at 12.

In the Wooster Report, Congress accepted the Secretary's investigation which found that the proportionate amount that the members of the Wisconsin Band residing in the United States would have received had they remained with the Pottawatomi who moved west of the Mississippi River, was $447,339.00, which amount was subsequently appropriated and paid thereto. No funds, however, were appropriated for the Pottawatomi residing in Canada.

The Pottawatomi residing in the United States and Canada filed claims with the Indian Claims Commission (the "ICC") in 1948 to recover the remainder of the unpaid annuities. See Hannahville Indian Community v. United States, No. 28 (Ind. Cl. Comm. filed May 4, 1948). The ICC dismissed the claims of the Pottawatomi residing in Canada on the ground that the ICC had no jurisdiction to determine the claims of Indians residing outside the territorial limits of the United States. The Canadian Pottawatomi filed a petition for appeal with the ICC in March 1949, but moved to dismiss their appeal on January 3, 1950. See Hannahville Indian Community v. United States, 115 Ct. Cl. 823 (1950). (Because the Pottawatomi did not receive payment, they continued to press their claim to both the Executive Branch officials and the United States Congress throughout the period from the 1910's to the 1940's, but to no avail.)

The Pottawatomi residing in the United States filed an amended petition with the ICC in 1951, identifying themselves as those Pottawatomi "whose places of abode are in Michigan and Wisconsin." Their case was transferred from the ICC to the United States Court of Claims in 1978. See Hannahville Indian Community v. United States, 41 Ind. Cl. Comm. 304, 307 (1978). The United States Claims Court (now the Court of Federal Claims) acquired the case in 1982 and entered judgment for the Pottawatomi residing in the United States in 1983. See Hannahville Indian Community, 4 Cl. Ct. 450. The Claims Court expressly excluded the Pottawatomi residing in Canada from its decision and stated that they were not involved in those proceedings. See id. at 456.

The Pottawatomi residing in the United States appealed this decision to the United States Court of Appeals for the Federal Circuit, arguing that the lower court's findings on the amount of damages was incomplete. The Federal Circuit affirmed the Claims Court's decision on damages, and the United States Supreme Court denied certiorari. See Hannahville Indian Community v. United States, 732 F.2d 167 (Fed. Cir.) (table), cert. denied, 469 U.S. 824 (1984).

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In 1984 plaintiffs in Hannahville filed a motion to reopen the judgment to allow disbursement of a proportionate share of the Claims Court award to the Pottawatomi residing in Canada. The motion was denied by the court in an unpublished Order on November 1, 1984. In 1988 Congress approved a plan developed by the Secretary of the Interior to distribute the judgment awarded in Hannahville to the Pottawatomi residing in the United States.

Plaintiffs filed suit on October 31, 1990, requesting unpaid treaty annuities from 1838, interest, damages, costs of the action, and attorneys' fees. Defendant's motion to dismiss was granted because plaintiffs did not bring their suit within the six years prescribed by 28 U.S.C. § 2501 (1988). Plaintiffs' motion for reconsideration was denied. See Pottawatomi Nation in Canada v. United States, 27 Fed. Cl. 388, 392 (1992).

Beyond the above facts, the parties cannot agree. The Hearing Officer has reviewed the comprehensive proposed factual stipulations prepared by each party and the responses of each thereto. The disputes are genuine and significant. The Hearing Officer has familiarized herself with the historical documents referenced in these proposed stipulations and can report as an independent fact finder that both parties' differing factual scenarios are supported by sound evidence.

After plaintiffs filed the instant complaint on February 27, 1995, defendant answered on June 27, 1995. Plaintiffs did not object to the delay, given the many treaties involved and their vintage. On July 26, 1995, the parties filed a comprehensive Joint Preliminary Status Report, requesting a six-month period for "preliminary formal discovery." The court adopted the parties' proposal in an order filed on July 27, 1995, and scheduled a status conference for November 2, 1995, to discuss the progress of discovery. Following a lengthy presentation on the discovery and expert analyses of the historical records, that proceeding yielded agreement to proceed to litigate what plaintiffs characterized as "the major threshold issue," the obligation of the parties to certain treaties. The parties requested that discovery be limited to interpretation of those treaties. An order entered on November 3, 1995, memorializing the agreement and, pursuant to the parties' request, bifurcating liability and damages proceedings, including discovery.

A subsequent status conference was held on March 7, 1996, at which the parties reported that they were willing to attempt a stipulation to sufficient facts that would enable a legal ruling on the threshold issue. An order entered on March 8, 1996, requesting that the parties furnish a draft stipulation by June 28, and scheduling another status conference for July 12, 1996. After an extension of time, the draft stipulations were exchanged, and a status conference was held on August 22, 1996, during which the parties reported their progress in agreeing to a comprehensive stipulation, narrowing the issues, and completing their expert analyses of the historical records. Additional time was requested, and granted, to complete

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these tasks. The parties were to notify the court by October 22, 1996, if they requested a subsequent status conference to discuss these matters.

On October 22, 1996, the parties first advised the court of their efforts to resolve the case short of dispositive motions or trial. An order entered that date required a report on the status of settlement by November 22, 1996. Because efforts to advance the case to dispositive motions or to reach a settlement were progressing, another status conference was deferred to February 25, 1997. The parties and the Hearing Officer agreed at that conference to an informal, but structured, process to attempt to settle the case. Each party on May 15, 1997, initially submitted to the Hearing Officer, but did not file, briefs and lengthy appendices addressing the threshold issue of the United States' breach of the treaties that plaintiffs contend amounted to a breach of the duty of fair and honorable dealings. Thereafter, by June 17, 1997, each party submitted a brief to the court stating its assessment of its strengths and weaknesses. An off-the-record settlement conference, attended by counsel for the parties, their principals, and experts, was held on July 23, 1997. That day-long effort resulted in an informal settlement.

Since July 1997 the court has met with the parties periodically to discuss their progress in implementing key features of the proposed settlement: protecting the United States from claims based on the same cause of action by any other individual who might assert rights as a member of the Pottawatomi Nation in Canada; implementing the mechanisms for a class action to be instituted in Canada to determine the proper parties who would share in the proceeds of any settlement fund; and limiting the United States' exposure and participation in that litigation. The complexity and political sensitivity of these matters cannot be understated. During the almost three years that this process has required, both parties have worked diligently to conclude their agreement. The Stipulation for Recommendation of Settlement signed on May 22, 2000, was submitted to the court on September 5, 2000. A copy is attached hereto as Appendix A.

DISCUSSION

1. History of the case

The Pottawatomi, known as the Pottawatomi Nation after 1846, held title to vast lands east of the Mississippi generally comprising northwestern Ohio, northern Indiana, southwestern Michigan, northeastern Illinois, and southeastern Wisconsin. Between 1795 and 1832, the Pottawatomi were parties to 19 treaties in which they ceded various lands to the United States. Several of these treaties provided for payment of annuities of various amounts and durations. *For example*, four of these annuities were perpetual. In 1833, in furtherance of a federal policy of extinguishing Indian title to lands east of the Mississippi, the Treaty of Chicago was concluded. Pursuant to the treaty, the Pottawatomi ceded

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approximately 5 million acres to the United States in return for a similarly sized tract in Missouri and various monetary considerations, including certain annuities. The Treaty of Chicago, which also confirmed the continued viability of the Government's annuity obligations to the Pottawatomi under various earlier treaties dating back to 1795, specified that the Pottawatomi were to remove themselves to the new reservation west of the Mississippi within three years. See The Treaty of Chicago, art. 2, 7 Stat. at 432. In 1834 the Senate refused to ratify the Treaty until the location of the new Pottawatomi reservation was switched from land in Missouri to land in Iowa and the removal stipulation was partially relaxed. In addition, the Articles Supplementary, Sept. 27, 1833, 7 Stat. 442, adopted the day after the Treaty of Chicago was executed, permitted those members of the Pottawatomi opposed to removal on religious grounds to relocate in northern Michigan, with the provision that those who remained in Michigan were to receive their "just proportion" of all annuities payable to the Pottawatomi under the Treaty of Chicago, its Articles Supplementary, and all earlier treaties.

Some Pottawatomi from Michigan and Indiana remained in southern Michigan and were undisturbed by federal authorities, even though their presence was not sanctioned by either the Treaty of Chicago or its Articles Supplementary. The descendants of those Indians comprised the Pottawatomi of Michigan and Indiana (who later brought suit in 1890 seeking their unpaid annuities). They are distinct from the Wisconsin Band, which consists of descendants of those Pottawatomi who failed to remove to Iowa by dispersing in northern Wisconsin. Some of the Wisconsin Band emigrated to Canada and formed the Pottawatomi Nation in Canada, plaintiffs in this case.

No annuity payments were made after 1835 to those Pottawatomi who remained in Michigan. They protested to Congress, which responded in 1866 with passage of a Joint Resolution authorizing payment of $39,000.00 in full satisfaction of all annuity claims, past, present and future, of the Pottawatomi of Michigan and Indiana. That sum was paid in due course. (No monies were appropriated in 1866 to satisfy the claims of the Wisconsin Band, of which the Pottawatomi Nation in Canada, plaintiffs allege, were a part.)

Dissatisfied, the Pottawatomi of Michigan and Indiana again petitioned Congress. Congress responded with a jurisdictional act in 1890 directing the United States Court of Claims, without regard to the relief mentioned above, to hear and determine all issues arising from treaty stipulations with the Pottawatomi of Michigan and Indiana. Two suits were instituted in the Court of Claims pursuant to the act -- one on behalf of 91 Pottawatomi said to come within the religious exemption of the Articles Supplementary and the other on behalf of 1,372 Pottawatomi, who had remained in Michigan without authorization, but without objection by the federal authorities. The court consolidated the cases for trial and ultimately held that the collective plaintiffs were entitled to recover $104,626.00, leaving the matter of apportionment of that award among individual Pottawatomi to the Secretary of the Interior,

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as provided by the reference. The court declined to commute to present value those perpetual annuities that were involved, holding that it lacked authority to do so. The Supreme Court affirmed the Court of Claims' decision. See Pam-to-Pee v. United States, 148 U.S. 691, 705 (1893), aff'g Potawatamie Indians v. United States, 27 Ct. Cl. 403 (1892).

Thereafter, Congress appropriated $156,658.50 in full satisfaction of the Court of Claims' judgment and in commutation of the Indiana and Michigan Pottawatomi's "just proportion" of all perpetual annuities to which they were entitled. Consequently, the Secretary of the Interior took a census of eligible Indiana and Michigan Pottawatomi and in accordance with its result distributed the appropriated funds. The 272 distributees included none of the 1,372 plaintiffs in the second of the two consolidated suits that had been decided by the Court of Claims. Those individuals thereupon brought a second suit in the Court of Claims, contending that they were erroneously excluded from the Secretary's census enumeration. The court denied relief on grounds of laches. See Pam-To-Pee v. United States, 36 Ct. Cl. 427 (1901), aff'd, Pam-To-Pee v. United States, 187 U.S. 371 (1902). They then petitioned Congress to award them $78,329.25, exactly one half of the amount appropriated in satisfaction of the earlier Court of Claims judgment. In 1904 the amount requested was appropriated and paid. See 33 Stat. 210-11. The plaintiffs in the Pam-To-Pee case neither sought, nor received, money for the Pottawatomi who left the United States.

In a subsequent action, the United States Claims Court determined that "[b]y reason of the legislative and judicial actions recounted above, it must be concluded that the Potawatomie of Michigan and Indiana have received all annuities due them under the Treaty of Chicago. Their present claims are therefore foreclosed by the principles of res judicata and accord and satisfaction." Hannahville Indian Community, 4 Cl. Ct. at 448.

The Wisconsin Band also claimed wrongful deprivation of their fair share of annuities payable under the Treaty of Chicago. The United States Treasury was directed to maintain the unpaid annuities for the Wisconsin Band's credit until it removed west. See 1864Act, 13 Stat. at 169. The Secretary of the Interior ruled that the Wisconsin Band forfeited its annuities by not moving west. By the 1864 Act, "Congress rejected this view, however, and appropriated $10,000 for the Band in 1864." Pottawatomi Nation in Canada, 27 Fed. Cl. at 389.

As stated above, in 1903 the Wisconsin Band petitioned Congress for their proportionate share of annuities payable under the Treaty of Chicago and related treaties. By the Act of June 21, 1906, 34 Stat. 325, 380 (1906), Congress instructed the Secretary of the Interior to investigate the claims and identify the amount retained in the Treasury to the Band's credit pursuant to the 1864 Act. If none had been retained, the Secretary was to determine the amount that should have been retained. In 1908 the Wooster Report was presented to Congress, which found that the United States owed the Wisconsin Band in

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United States $447,339.00 and the Pottawatomi in Canada $1,517,226.00. No funds were appropriated for the Pottawatomi living in Canada.

As stated above, the American and Canadian Pottawatomi filed claims with the ICC in 1948 to recover the remainder of the unpaid annuities. See Hannahville Indian Community, No. 28 (Ind. Cl. Comm.). The ICC dismissed the claims of the Pottawatomi residing in Canada on the ground that the ICC had no jurisdiction to determine the claims of Indians residing outside the territorial limits of the United States. The Canadian Pottawatomi filed a petition for appeal with the ICC in March 1949, but moved to dismiss their appeal on January 3, 1950. See Hannahville Indian Community, 115 Ct. Cl. at 823.

As stated above, the Pottawatomi in the United States filed an amended petition with the ICC in 1951, identifying themselves as those Pottawatomi "whose places of abode are in Michigan and Wisconsin." Their case was transferred from the ICC to the United States Court of Claims in 1978. See Hannahville Indian Community, 41 Ind. Cl. Comm. at 307. The United States Claims Court acquired the case in 1982 and in 1983 entered judgment for the Pottawatomi residing in the United States. See Hannahville Indian Community, 4 Cl. Ct. at 450. The Claims Court expressly excluded the Canadian Pottawatomi from its decision and stated that they were not involved in those proceedings. See id. at 456.

As stated above, in 1984 the Hannahville plaintiffs filed a motion to reopen the judgment to allow disbursement of a proportionate share of the Claims Court award to the Pottawatomi living in Canada. The Claims Court denied the motion in an unpublished order issued on November 1, 1984. In 1988 Congress approved a plan developed by the Secretary of the Interior to distribute the judgment awarded in Hannahville to the Pottawatomi residing in the United States. The Canadian Pottawatomi filed suit on October 31, 1990, under the Tucker Act, 28 U.S.C. § 1491(a) (1988), requesting unpaid treaty annuities from 1838, interest, damages, costs of the action, and attorney's fees. The Court of Federal Claims granted defendant's motion to dismiss because the Canadian Pottawatomi did not bring their suit within the six years prescribed by 28 U.S.C. § 2501 (1988). See Pottawatomi Nation in Canada, 27 Fed. Cl. at 390.

2. Nature of Congressional Reference and procedural defenses

A congressional reference is a unique mechanism that allows a party to seek relief through a private bill passed by one house of Congress. See 28 U.S.C. § 1492 (1994); Alleman v. United States, 43 Ct. Cl. 144, 150-51 (1908); see Spalding & Son, Inc. v. United States, 28 Fed. Cl. 242 (Rev. Panel 1993).

On September 12, 1994, by Senate Resolution 223, 103d Cong. (1994) (enacted), the Senate referred S. 2188, 103d Cong. (1994) (the "Reference"), to the Chief Judge of the

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United States Court of Federal Claims and directed him to proceed pursuant to 28 U.S.C. §§ 1492, 2509. See S. Res. 223. The Resolution provides, in pertinent part:

> *Resolved*, That S. 2188 entitled "A bill for the relief of the Pottawatomi Nation in Canada for the *proportionate share* of tribal funds and annuities under treaties between the Pottawatomi Nation and the United States, and for other purposes", [sic] now pending in the Senate, together with all accompanying papers, is referred to the Chief Judge of the United States Court of Federal Claims. The Chief Judge shall . . . report back to the Senate, at the earliest practicable date, providing such findings of fact and conclusions that are sufficient to inform the Congress of--
>
> (1) whether the claims against the United States of the Pottawatomi Nation in Canada that *would have been compensable* under the Indians Claims Commission Act (25 U.S.C. 70 et seq.) *but for residence of the Pottawatomi Nation in Canada and outside of the territorial limits of the United States are legal or equitable in nature*;
>
> (2) the *amount of damages* (if any) that the Pottawatomi Nation in Canada would have been entitled to receive under such Act but for the residence of the Pottawatomi Nation in Canada and outside of the territorial limits of the United States that is payable to the Pottawatomi Nation in Canada in accordance with section 1(1) of S. 2188; and
>
> (3) the *amount of interest* that is payable on the amount referred to in paragraph (2) in accordance with section 1(2) of S. 2188, calculated at a rate of 5 percent per year.

(Emphasis added.) S. 2188, the Bill accompanying this resolution, provides, in pertinent part:

> SECTION 1. AUTHORIZATION OF PAYMENT.
>
> *Notwithstanding the sovereign immunity of the United States, any statute of limitations, lapse of time, bar of laches, res judicata, collateral estoppel, or any other procedural defense, or any other provision of law*, the Secretary of the Treasury shall pay to the Pottawatomi Nation in Canada, out of any money in the Treasury of the United States not otherwise appropriated, $_____, which shall be equal to the sum of--
>
> (1) *the proportionate share of the tribal funds and annuities* that arise under treaties between the Pottawatomi Nation and the United States that, but for the residence of the

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> Pottawatomi Nation in Canada and outside of the territorial limits of the United States, would have been compensable under the Indian Claims Commission Act (25 U.S.C. 70 et seq.); plus
>
> (2) interest computed at a rate of 5 percent per year on the amounts calculated under paragraph (1).

(Second and third emphases added.) Thereafter, plaintiffs 2/ filed their complaint in this court, which pleads seven counts:

1) failure to fulfill treaty obligations, including the payment of certain annuities on a *per capita* basis;

2/ Plaintiffs in this congressional reference include the Pottawatomi Nation in Canada, on behalf of its members and acting as *parens patriae,* and Edward Williams, Stewart King, Cynthia Wesley-Esquimaux, and Frank Shawbedees, on behalf of themselves and as members of the Pottawatomi Nation in Canada. Plaintiffs appear to be individual members of the Pottawatomi Nation in Canada and not suing as a tribal unit. Of concern to defendant was whether the United States can distribute the annuity payments to either a designated person of the Pottawatomi Nation in Canada or a trustee and whether that person can make the proper allocation to the individual members. This concern was addressed specifically in Potawatamie Indians v. United States, 27 Ct. Cl. 403 (1892). The Court of Claims held:

> Congress have [sic] recognized by the very title of the act a claimant designed as the "Pottawatomie Indians of Michigan and Indiana," and under that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that Department of the Government, which by law has incumbent on it the administration of the trust, which in legal contemplation exists between the United States and the different tribes of Indians.

Id. at 414. In the case at bar, in order to overcome such an administrative burden should liability have been found, the Hearing Officer could recommend an award of funds to the Pottawatomi Nation as trustee and require the Nation to indemnify the United States on any future claims based on breach of the treaties. The parties have resolved this conundrum by providing for a class action lawsuit to be commenced in Canada that will bind all Canadian Pottawatomi and thereby protect the United States from any other claims.

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2) an accounting of treaty annuities; 3/
3) revision of various treaties on the basis of unconscionable consideration and duress;
4) failure to compensate the Pottawatomi and pay fair market value for their land constituting a Fifth Amendment "taking";
5) breach of statutory duty as provided in the Acts of 1864 and 1906 by which plaintiffs claim the right to receive treaty annuities on a *per capita* based upon plaintiffs' ancestors' rights and the United States' failure to retain the Canadian Pottawatomi's unpaid treaty annuities;
6) breach of fiduciary duty as plaintiffs' trustee by failing to retain and manage various funds and unpaid annuities for their benefit on a *per capita* basis; and
7) dishonorable dealings under section 2(5) of the Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049, 1050 (formerly codified at 25 U.S.C. § 70) (the "ICCA").

Defendant denied plaintiffs' right to recovery and has asserted the following defenses:

1) failure to state a claim upon which relief can be granted;
2) lack of jurisdiction to entertain a claim for personal rather than tribal monies;
3) lack of standing;
4) equitable estoppel;
5) laches;
6) payment of additional monies constitutes a gratuity;
7) "If plaintiffs or their ancestors had any right to receive any benefits under any treaties, which right defendant denies, then such right terminated by reason of, or when, upon information and belief: (a) plaintiffs or their ancestors ceased being the tribal entity (or in the alternative, ceased being members of the tribal entity) which entered into the treaty(ies); or (b) refused to remove west of the Mississippi River in accordance with the tribal promise to do so; or (c) representatives of the Pottawatomi Nation advised the United States that payment should be made only to those members who removed west of the Mississippi or otherwise excluded plaintiffs or their ancestors; or (d) plaintiffs or their ancestors served in military alliance with Great Britain against the interests of the United States in or after 1838";
8) breach of plaintiffs' duty to present themselves for payment or breach of duty to inform the United States that they were Pottawatomi entitled to receive payment;
9) If the Pottawatomi Nation in Canada "are and were descendants of remnant members of historically known bands of Pottawatomi Indians, the ancestors of the Pottawatomi Nation in Canada abandoned the tribal organization of the Pottawatomi Nation in the nineteenth

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3/ Plaintiffs note that the United States, through the General Service Administration, Indian Trust Division, provided a partial accounting report, entitled the "Report of Pottawatomi Treaty Compliance 1797 to 1865."

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century, lost their identity as part of the Pottawatomi Nation, emancipated themselves from any tribal control and forfeited their alleged rights to the communal property of the tribe, including any benefits under any of the treaties alleged in the complaint";
10) statute of limitations; and
11) res judicata.

Ans. filed June 27, 1995, at 21-22.

Plaintiffs respond that the treaty did not require removal and that, in any case, the United States failed to fulfill its promise to ensure that 'full justice would be done,' a necessary condition predicate. Furthermore, plaintiffs assert that they are a successor group to the Historical Pottawatomi Nation and, as such, should receive a proportionate share of the treaty promised annuities. Defendant asserts that "the Reference directs only that the claim be analyzed without consideration of plaintiff's [sic] residence in Canada. The Reference does not preclude reporting on other defenses, such as the statute of limitations and laches." Def's Br. of May 22, 1997, at 1 n.1. In support of this proposition, defendant characterizes the Reference as providing only that the court determine whether plaintiffs state a claim that would have been compensable, but for their Canadian residency, under the ICCA. Defendant contends that the Reference waives all procedural "defenses as to damages, but not liability, and notes that the Reference only refers to procedural defenses in section 1(1) of S. 2188, which provides for the payment of damages." Id. Plaintiffs counter that the Reference and ICCA waive all procedural defenses. See Plfs' Br. of May 22, 1997, at 24-25 (stating that under the ICCA, 25 U.S.C. § 70(a), "'[a]ll claims . . . may be heard . . . not withstanding statutes of limitations and laches'").

Senators Inouye and Simon sponsored Senate Resolution 223 and S. 2188. In doing so, Senator Inouye stated:

> In the 101st Congress, I introduced a similar bill, which would have permitted the Court of Federal Claims to consider the merits of the claim of the Pottawatomi Nation in Canada. At that time, the Pottawatomi Nation in Canada was urged to exhaust their legal remedies by bringing suit in the Court of Federal Claims, under the Tucker Act. In 1992, the Court of Federal Claims ruled that the Pottawatomis were barred under a statute of limitation. Again, the merits of the claim were not heard.
>
> [M]embers of the Pottawatomi Nation in Canada have diligently sought to enforce their rights under the solemn treaties they entered into with the United States. This bill seeks to uphold those obligations of the United States *by waiving technical legal defenses* in permitting the Chief Judge of the U.S. Court of Federal Claims *to consider the merits of the claim.*

140 Cong. Rec. S6863 (daily ed. June 14, 1994) (citation omitted; emphasis added). Senator Inouye's statement constitutes the only substantive legislative history on this Reference and, according to plaintiffs, explicitly provides that Congress intended to waive all procedural defenses and to allow plaintiffs to have their day in court.

The Congressional Reference statute, however, directs the Hearing Officer to make such findings, see 28 U.S.C. § 2509(c), and, in order to provide a full record, the Hearing Officer sets forth the issues and cases on point.

Defendant asserts the affirmative defense of statutes of limitations and laches. The Court of Federal Claims specifically found these plaintiffs' claim to be time-barred. See Pottawatomi, 27 Fed. Cl. at 390. Under section 2509(c), however, the Hearing Officer could recommend that the bar of the statute of limitations be lifted if good cause is present:

> Good cause has been found "where the Government's administrative consideration of the claim was slipshod and desultory, thereby contributing to the delay which caused the damage; where the claimant has relied on Government advice to his detriment; where he has not sleeping on his rights because justifiably relying on others; where the Government has been unjustly enriched; and where the failure to proceed in timely fashion was the result of incapacity."

McQuown v. United States, 199 Ct. Cl. 858, 874 (1972) (quoting M.T. Bennett, Private Claims and Congressional References, H. Comm. Print, 90th Cong., 2d Sess. 10 (1968)). Thus, were the Hearing Officer to recommend lifting the statute of limitations bar, she would examine the equities favoring both plaintiffs and the United States.

Laches is an equitable defense that rests on considerations of fairness. See Acuna v. United States, 1 Cl. Ct. 270, 279 (1982). Laches denies relief to one who unreasonably and inexcusably delays in "assertion of the claim, where the delay results in injury or prejudice to the adverse party." Deering v. United States, 223 Ct. Cl. 342, 347, 620 F.2d 242, 244 (1980) (quoting Brundage v. United States, 205 Ct. Cl. 502, 505, 504 F.2d 1382, 1384 (1974)).

In Pam-To-Pee, Congress granted the Court of Claims jurisdiction over the claims of certain Native Americans against the United States. The court previously prescribed a mode of judgment distribution. Discussing the necessity of the parties' compliance, the court stated:

> This is not an ordinary judgment at law in which the plaintiff entitled to receive and the defendant bound to pay are both named, and in which the

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> absolute duty is cast upon the defendant to see that the right party is paid, but a case in which the amount of a fund for distribution was determined, and directions made for ascertaining the beneficiaries of that fund. The debtor and the beneficiaries were each interested in question of identification, and both bound by the conclusion reached in respect thereto if the directions were fully complied with.

Id. at 379. Because plaintiffs in that case failed to take any affirmative steps during the two years prior to entry of an order directing payment, they were barred from inclusion in the distribution. See id. at 375-76, 380.

The Hearing Officer has evaluated the parties' respective showings regarding lifting the bar of the statute of limitations and the applicability of the laches defense. Substantial litigation risks inhere in both, as the Hearing Officer advised the parties in 1997. Specifically, plaintiffs are vulnerable because their efforts were, defendant contends, sporadic, and they are foreign nationals, and the United States long ago made settlements that arguably put all claims at rest. Defendant's weaknesses are that the Reference purports to waive all such defenses and that plaintiffs' efforts, in the circumstances that they faced over the years, could demonstrate the requisite persistence. The factual record contains evidence to support both positions.

3. Applicable ICCA provisions

Plaintiffs claim that standing and jurisdiction to hear this case stem from the ICCA:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: . . . (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; . . . and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

60 Stat. at 1050.

1) Fair and honorable dealings

Count Seven of the complaint alleges that the United States violated its obligation of fair and honorable dealings by failing to compensate plaintiffs' annuity payment on a *per*

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capita basis under various treaties, including the Treaty of Chicago. Congress created the fair and honorable dealings cause of action to provide Native Americans who could not sue under existing rules of law and equity an opportunity to have their claims argued on the merits. See Confederated Tribes of the Colville Reservation v. United States, 964 F.2d 1102, 1110 (Fed. Cir. 1992). In considering a fair and honorable dealings claim, the Hearing Officer must "examine all of the facts presented to determine whether . . . the conduct of the Government in its dealings with the Indians was fair and honorable." Id. (quoting Creek Nation v. United States, 168 Ct. Cl. 483, 494-95 (1964)). As such, the Hearing Officer must engage in a broad and fact-intensive inquiry. See id. at 1109-10.

To determine whether the United States violated its fair and honorable dealings obligation, plaintiffs would be required to show:

1) The United States undertook an obligation or "special relationship" with plaintiffs;
2) The United States owed the obligation or special relationship to plaintiffs;
3) The United States breached its obligation or special relationship to plaintiffs; and
4) Plaintiffs, as a result of the breach, suffered damages.

See id. at 1113; Aleut Community v. United States, 202 Ct. Cl. 182, 196, 480 F.2d 831, 841 (1973). The parties do not dispute the elements of this cause of action.

2) Whether the United States entered into a "special relationship"

Determining whether a special relationship exists is a fact-intensive inquiry. See Confederated Tribes, 964 F.2d at 1115. "That something or someone is or is not fair or honorable is always a conclusion or an inference based upon many factual considerations." Id. (quoting Snake or Piute Indians v. United States, 125 Ct. Cl. 241, 255, 112 F. Supp. 543, 552 (1953)). A special relationship may be established by 1) the parties' course of dealings, including statutes, treaties, governmental acts and representations, and moral obligations; 2) a treaty of adhesion; and 3) the Government's retention of fee simple title over a tribal reservation, showing "continued concern" over the "life and livelihood of the [t]ribe." United States v. Oneida Tribe of Indians of Wis., 165 Ct. Cl. 487, 493 (1964); see Confederated Tribes, 964 F.2d at 1114. Plaintiffs, in essence, seek to prove alternative ways to establish a special relationship.

i) Special relationship established by course of dealings

In order to establish a special relationship by course of dealings, the Hearing Officer must engage in a

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> thorough and careful consideration not only of what was actually done, but also of that which was not done and of the motives and circumstances surrounding and underlying the overt acts of the parties, and their intentions, etc. . . . The evidentiary facts based on the circumstances establishing such justification, or the lack of it, are facts as indispensable on the issue of fair and honorable dealings, as the bare facts of the dealings themselves.

Snake or Piute Indians, 125 Ct. Cl. at 270, 112 F. Supp. at 560-61; see Confederated Tribes, 964 F.2d at 1115 (discussing quantum of proof necessary for fair and honorable dealings and frequency with which cases remanded because of inadequate factual findings). A bright-line test or formal checklist for determining whether a relationship is special does not exist. See Confederated Tribes, 964 F.2d at 1114-16.

Plaintiffs contend that the parties' course of dealings establishes a special relationship. Specifically, plaintiffs cite to three facts:

1) The Office of Indian Affairs requested a full census of the Pottawatomi Tribe in Wisconsin and Michigan and Ontario, Canada.

2) Congress rejected a census, that had excluded the Canadian Pottawatomi, and commissioned a report that included plaintiffs. The Wooster Report recommended a monetary award of $1,517.226.00 to the 1,550 Wisconsin Pottawatomi residing in Canada. The recommendation was not implemented.

3) The conclusions of the Wooster Report were made known to the Canadian Pottawatomi.

It cannot be decided without undertaking a fact-intensive, resource-intensive inquiry if these facts are sufficient to establish a special a special relationship. In fact, short of a trial on the merits, the Hearing Officer could not determine conclusively whether a special relationship exists. See Confederated Tribes, 964 F.2d at 1116 (discussing inappropriateness of summary judgment on select cases involving fair and honorable dealings clause); Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 502 (1967) (finding that where facts "are not readily apparent from the materials presented to this court" summary judgment is not appropriate); Creek Nation, 168 Ct. Cl. at 495 ("[The [ICCA] requires the [factfinder] to hear the Indians' claim of unfair and dishonorable dealings on the merits.").

Defendant offers a substantial historical record that reveals other factors, such as the voluntariness of the Pottawatomi's resettlement to Canada and their failure to reunify with the American Pottawatomi. The Hearing Officer would focus on all these factors as they provide unique insight into the motives and circumstances behind the parties' actions. See Snake or Piute Indians, 125 Ct. Cl. at 270-71, 112 F. Supp. at 560-61 (discussing all relative factors and importance of express agreements and surrounding circumstances).

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ii) Special relationship established by a treaty of adhesion

An adhesion treaty is defined as

> [t]he entrance of another nation into an existing treaty with respect only to a part of the principles laid down or stipulations agreed to. . . . [T]he third party nation becomes a party only to such parts as are specifically agreed to, and by accession it accepts and is bound by the whole treaty.

Black's Law Dictionary 40 (6th ed. 1990). Plaintiffs cite United States v. Goshute Tribe or Identifiable Group, 206 Ct. Cl. 401, 407, 512 F.2d 1398, 1400-01 (1975). Goshute involved a treaty between the United States and the Goshute Tribe to "cease all depredations [so] that military posts, highways and a railway might be built through their territory." Id. at 405, 512 F.2d at1400. The Government also wished to "'explore[ ] and [to] prospect[] [the Goshute's land] for gold and silver, or other minerals and metals.'" Id. at 406, 512 F.2d at 1400. In exchange, the Government agreed to pay the Goshute "$1,000 per annum, in kind, for twenty years, to compensate them for the 'inconvenience' of having their game driven away or destroyed, and by the formation of agricultural and mining settlements in their territory." Id., 512 F.2d at 1400. For six years, not provided for by the treaty, silver ore totaling $6 million was removed from the Goshutes' land. In 1875 the Government took the Goshutes' land, but the majority of the Goshute members already had relocated to the "the reservations established for them." Id., 512 F.2d at 1400.

Plaintiffs sued for the value of the minerals taken during the six years prior to the 1875 taking. The court found that the treaty was one of adhesion. See id. at 407-08, 512 F.2d at 1400-01 ("Such a 'special relationship' arises when United States officials tender a Treaty to Indians for adhesion."); see also Temoak Band of W. Shoshone Indians, Nev. v. United States, 219 Ct. Cl. 346, 357, 593 F.2d 994, 999-1000 (1979) (referring to Goshute, the Court of Claims observed that "large amounts of valuable ores were mined and removed between the treaty dates and the found or agreed dates of valuation, or in other words, of full title extinguishment. . . . [and that] the tender of such a one-sided treaty for adhesion, in 1863, to ignorant and unlettered Indians was unfair and dishonorable"); United States v. Sioux Nation of Indians, 207 Ct. Cl. 234, 241, 518 F.2d 1298, 1302 (1975) (quoting Goshute).

Plaintiffs argue that the treaties between the Pottawatomi and the United States were treaties of adhesion, and, therefore, a special relationship arose between the Government and the Pottawatomi Nation. They assert:

> The United States made assurances that the Historic Pottawatomi Nation would receive good land in Missouri, and assured that "full justice" would be

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> done. In Art. IV of the Treaty of Chicago, a "just proportion" was promised to all Pottawatomi. Subsequently, the United States *unilaterally changed the western lands, a material change, and acquired nominal "assent" to these changes*. Under these circumstances, the Treaty of Chicago constitutes an adhesion treaty, creating a special relationship.

Plfs' Br. at 16 (emphasis added).

An adhesion treaty could be predicated on the Government's promise, in the Treaty of Chicago, of 5 million acres of land west of the Mississippi, which was similar in quality to the land ceded in Missouri. Defendant, through a congressional resolution, altered the original agreement by changing the grant from land in Missouri to land in Iowa. Plaintiffs have evidence that the Iowa land did not compare to the quality of Missouri land. Plaintiffs contend that this change violated the full justice clause in the Treaty of Chicago. The Pottawatomi only nominally assented to the supplemental changes. Although only seven out of the 77 tribal leaders signed the Treaty of Chicago's Articles Supplementary, the Pottawatomi were bound to these subsequent changes. Once again, the parties' showings rest on the historical record, which contains documents that support both parties' positions. Given that only trial could resolve this issue, the risks posed by ligation are genuine.

iii) Special relationship established by implied trust

The Court of Claims has addressed the issue of whether an implied duty of trust may exist where the parties explicitly did not create a duty. See Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183-85, 624 F.2d 981, 986-88 (1980). The Navajo Tribe sought an accounting from the Government, alleging a violation of its fiduciary duty by failing to submit proper accounting records. The Government denied any fiduciary duty to the Navajos, because there existed no "*express* provision of a treaty, agreement, executive order or statute creating such a trust relationship." Id. at 183, 624 F.2d at 987. The court rejected defendant's argument and found an implied trust relationship from the Government's duty to account for management of Navajo plaintiffs' property independent of any statute. See id. at 185, 624 F.2d at 988; see also Navajo Tribe v. United States, 176 Ct. Cl. 502, 507, 364 F.2d 320, 322 (1966) (stating that "[n]umerous cases have expressed the notion that, when dealing with Indian property, the Government may be acting as a 'trustee'"); Menominee Tribe of Indians v. United States, 101 Ct. Cl. 10, 19 (1944) (holding that when United States "deal[s] with the property of the Indians, [the Government becomes] a trustee").

The Treaty of Chicago does not acknowledge a trust relationship, although the United States may have exercised the requisite dominion and control over the Canadian Pottawatomi's annuities. Resolution of this question would require trial, and the evidence examined to date supports both positions.

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iv) Whether a duty was owed to the Canadian Pottawatomi

The Hearing Officer must determine whether the United States undertook a special obligation with respect to the Canadian Pottawatomi. See Aleut Community, 202 Ct. Cl. at 196, 480 F.2d at 839. Plaintiffs argue that the Government has both statutory and treaty obligations to the Canadian Pottawatomi on a *per capita* basis or, alternatively, as a descendent successor group of Pottawatomis who did not share in prior awards to the Pottawatomi for unpaid annuities. Defendant contends that the Government was under no duty to the Canadian Pottawatomi because they failed to honor the treaty agreement to remove west of the Mississippi, and the Government's duty was to pay the Pottawatomi as one single entity and not individual members of the Tribe based on a *per capita* calculation.

Defendant maintains that the Canadian Pottawatomi reneged on their obligation under the Treaty of Chicago by fleeing to Canada. Article 2 of the Treaty of Chicago states that the Pottawatomi should "remove to the country thus assigned to them as soon as conveniently can be done."

> [I]t is further agreed that as fast as the said Indians shall be prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for one year after their arrival at their new homes.–It being understood, that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois, immediately on the ratification of this treaty, but to be permitted to retain possession of the country north of the boundary line of the said State, for the term of three years, without molestation or interruption and under the protection of the laws of the United States.

Treaty of Chicago, art. 2, 7 Stat. at 432. Defendant further points to Article 4, which states:

> A just proportion of the annuity money, secured as well by former treaties as the present, *shall be paid west of the Mississippi to such portion of the nation as shall have removed thither* during the ensuing three years.--After which time, the whole amount of the annuities shall be paid at their location west of the Mississippi.

Treaty of Chicago, art. 4, 7 Stat. at 433 (emphasis added). According to defendant, the Government did not incur an obligation to the Canadian Pottawatomi because they never "removed thither." Under the Treaty of Chicago, the tribes agreed to cede 5 million acres of land, and in exchange the Government agreed to provide 5 million acres of land located west of the Mississippi River

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> beginning at the mouth of Boyer's river on the east side of the Missouri river, thence down the said river to the mouth of the Naudoway river, thence due east to the west line of the State of Missouri, thence along the said State line to the northwest corner of the State, thence east along the said State line to the point where it is intersected by the western boundary line of the Sacs and Foxes -- thence north along the said line of the Sacs and Foxes, so far as that when a straight line shall be run therefrom to the mouth of Boyer's river (the place of beginning) it shall include five million acres.

Treaty of Chicago, art. 2, 7 Stat at 431.

The Treaty of Chicago and Articles Supplementary, signed the next day, required Senate approval for their ratification. However,

> the Senate balked at its ratification. Not only were many senators angry over the alleged fraud, but the state of Missouri waged a strong campaign in opposition to the treaty. The agreement awarded the Pottawatomis approximately thirty-one hundred square miles of well-watered, fertile lands between the western boundary of Missouri and the Missouri River. Located in what now is extreme northwestern Missouri, this tract, known as the Platte Country, had been omitted from the state when Missouri achieved statehood in 1820. Officials in Missouri were anxious to annex the region and opposed its inclusion within those lands granted to the Pottawatomis. In the Senate, Missourians . . . blocked the treaty and amended the document so that the Platte Country was deleted from the new Pottawatomi lands in the west. In exchange, a similar acreage was added to the Pottawatomi lands in Iowa, and the Senate conditionally ratified the amended treaty in May, 1834.

David Edmonds, The Pottawatomi: Keepers of the Fire, 249 (1978). The amended treaty required approval by the Pottawatomi, who resisted.

> Although the tribesman from Michigan and Indiana steadfastly refused to sign the new document, in October, 1834, [ ]Caldwell, [ ]Robinson, [ ] Waubansee, and four other Pottawatomis from northern Illinois agreed [to the revised terms]. In return, the government agreed to pay Caldwell's followers an additional ten thousand dollars upon their removal to Iowa. Since the original treaty had been signed by more than 120 Pottawatomis, and the amended agreement bore the signatures of only Caldwell and six others, the Pottawatomis in Michigan and Indiana raised a storm of protest. Yet the Senate accepted the new agreement as valid, and the treaty was finally ratified in February, 1835.

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> . . . The Pottawatomi [who examined the new lands] were unhappy over the lands in Iowa, complaining that there were no trees and that the region was too near the Sioux.

Id. at 250. Consequently, the Government used military force to propel the Pottawatomi into Iowa and eventually Kansas. Many Pottawatomi died en route. Rather than attempt the journey, other Pottawatomi fled.

The Hearing Officer could find that 1) the Government made unilateral changes in the Treaty of Chicago; 2) those changes were detrimental to the Pottawatomi's quality of life; and 3) consequently, the tribal members were no longer obliged to remove west of the Mississippi. Alternatively, the Hearing Officer could find that the United States waived the prerequisite of removal for the receipt of annuities. The Court of Claims, in interpreting the Treaty of Chicago, held that the United States, absent an express agreement, could not create treaty conditions from thin air. See Potawatamie Indians v. United States, 27 Ct. Cl. 403, 415 (1892). Specifically, the Court of Claims reasoned:

> It is insisted upon the part of counsel for the defendants that the removal of the Indians was a condition precedent to their right to participate in the general fund of the united nation recognized by the [Treaty of Chicago and its Articles Supplementary].
>
> That can not [sic] now be considered as an original question. The Government, by its agents, laws, and resolutions of Congress, has treated the removal and continued residence in the northern peninsula of Michigan as immaterial, and it is now too late to attempt to ingraft upon the right of the Indians, *a removal and continued residence as a condition precedent to their right to participate* in the funds arising from the various treaties made with the united nation.

Id. (emphasis added).

Although this issue might be resolved in plaintiffs' favor, the risk to their success would be their claim to a continuing relationship with the American Pottawatomi. The facts presented to the Hearing Officer counsel that the result cannot be predicted.

v) *Per capita* payments

Turning to the issue of how payments were to be made, plaintiffs argue that *per capita* means payments made to individual persons. Defendant responds that plaintiffs misconstrue the meaning of *per capita*. To explain the term, defendant analyzes Pottawatomie Nation of

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Indians v. United States, 205 Ct. Cl. 765, 507 F.2d 852 (1974), concluding that the United States only owed a duty to the Pottawatomi Nation, not to individual Pottawatomi. See Felix S. Cohen's Handbook of Federal Indian Law 550 (Rennard Strickland et al. eds., 1982) ("Ordinarily, payments promised in a treaty and paid in . . . annuities were due directly to the tribe and, as obligation of one nation to another, were deemed satisfied when tribal authorities received the funds." (citation omitted)).

Plaintiffs essentially argue that the course of dealings between the parties establishes that the treaty obligations were owed to all Pottawatomi on a *per capita* basis. By entering into a treaty with plaintiffs, the relationship resembles that of a ward and guardian. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). As the United States entered into a supervisory relationship with the Pottawatomi, a fiduciary relationship exists, and plaintiffs contend that the fiduciary relationship runs not only to the Tribe, but to its members.

The Treaty of Chicago provided for *per capita* distribution. In 1892 the Court of Claims analyzed the Treaty of Chicago and "just proportion." See Potawatamie Indians, 27 Ct. Cl. at 416. The court surmised:

> They were to have, as we construe the words of the treaty, "a just proportion" of the annuities arising from all the treaties provided for in the supplementary articles of the 27th of September, 1833. Those who emigrated under the supplementary articles did not lose their right to participate in the general fund because of the additional clause to said articles. They were not parties to it, and their rights should not be affected by it. To give the whole of the annuity to the remaining Indians would be enlarging the additional article beyond the purpose of its adoption, and in violation of the obvious construction of the language employed in its terms. The remaining Indians simply obtained by the additional article exemption from the obligation of removal and the right to enjoy their share or "just proportion" of the money arising from the provisions and stipulations of the treaty. For these reasons we are constrained to determine that in this proceeding the petitioners are only entitled to "a just proportion" of the $38,000 provided for in the supplementary articles of September 27, 1833.

Id. at 419. Although the Court of Claims dealt with the supplementary articles of the Treaty of Chicago, the Hearing Officer could reasonably conclude that the Court of Claims' interpretation of the just proportion clause is equally applicable to the original Treaty of Chicago signed on September 26, 1833.

Defendant correctly contends that

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> [t]he court did *not* hold or suggest that individual members of the Pottawatomi Nation had personal rights in the treaty benefits, or that the United States had a duty to ascertain the membership of the tribe, or to guarantee that anyone who may claim to a member should receive a distributive share.

Def's Br. at 11-12. However, even though the annuity was payable to the tribe, the amount of the annuity was based on the number of individual tribal members. See, e.g., Potawatamie Indians, 27 Ct. Cl. at 414 ("[U]nder that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that Department of the Government, which by law has incumbent on it the administration of the trust, which in legal contemplation exists between the United States and the different tribes of Indians.")

The Court of Claims previously found that a course of dealings between the Pottawatomi and the Government in paying annuities occurred on a *per capita* basis. See Pottawatomie Nation, 205 Ct. Cl. at 778, 507 F.2d at 856. This case dealt with the issue of "whether all Indians of the Pottawatomie tribe, or only certain groups thereof, should share in any award by the Commission of additional compensation for lands ceded by Pottawatomies under the treaty of October 20, 1832, 7 Stat. 378." Id. at 767, 507 F.2d at 854. The court held:

> Further reference should be made to the annuity payments made by the United States to the Pottawatomies pursuant to the various treaties we have been discussing. The identity of the recipients of the annuities, and whether the annuities were paid according to "bands" or distributed to all Pottawatomies *per capita,* are questions, the answers to which would be significant in assessing whom the United States viewed as treaty parties. *The Commission cites evidence which it believes indicates that the payment of annuities was to all Pottawatomies on a* per capita *basis*. Appellants and the Commission minority dispute the majority's interpretation of the evidence. The minority concludes that "[a]t this late date it is impossible to ascertain how, on what basis, or to whom annuities under Potawatomi treaties were actually paid during much of the period from 1817 through 1856."
>
> While we can understand the reasons which led to the minority to the above conclusion, *we also believe that the Commission's more positive conclusion is supported by substantial evidence and must be upheld.* Two examples should suffice. H.R. Exec. Doc. No. 61 is an 1869 report by Indian commissioners of Pottawatomie claims under various treaties to which the Pottawatomie nation was a party. The report was referred to the Committee on Indian Affairs and ordered to be printed. The major part of the document is a listing of payments made on a treaty-by-treaty basis. The document uses

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> the terms "Pottawatomie Indians" and "Pottawatomie Claims"; *nowhere is there an indication that payments were made to a band or bands of Pottawatomie Indians.* A second document is a letter of April 16, 1825, by Lewis Cass, who during his career was Superintendent of Indian Affairs at Detroit, Governor of Michigan Territory, Commissioner of Indian Affairs in the War Department, and Secretary of War. He wrote in the letter that annuities were the "consideration paid by the United States for valuable cessions made by the Indians in their national character."

Id. at 778-79, 507 F.2d at 860-61 (emphasis added; footnote omitted).

The decisional law does not create an automatic *per capita* claim. Therefore, in weighing the facts, plaintiffs would be required to present "sufficient evidence" to support a finding that the Government intended to pay an obligation on a *per capita* basis. Based on an independent review of the historical record, the Hearing Officer deems satisfaction of this element subject to litigation risks for both plaintiffs and defendant.

vi) Whether the United States breached its duty

If the Hearing Officer were to find a special relationship and a duty running to plaintiffs, the next hurdle is whether the United States breached its obligation. The Government, as trustee, is "under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust." Navajo Tribe, 224 Ct. Cl. at 187, 624 F.2d at 989 (quoting Restatement (Second) of Trusts § 172 (1959)). The Government must also account "for its performance of treaty obligations." Id. at 188, 624 F.2d at 990; see Chitto v. United States, 133 Ct. Cl. 643, 658, 138 F. Supp. 253, 263 (1956) (stating that "the Government was under a duty to insure that whatever was due . . . was in fact paid over to [the Chitto Group]"). A high fiduciary standard is placed on the Government. See Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (stating that Government's "conduct, as disclosed in the acts of those who represent it in dealings with Indians, should therefore be judged by the most exacting fiduciary standards"); Navajo Tribe, 224 Ct. Cl. at 187, 624 F.2d at 989 ("Where a trust relationship between the Government and the Indians is established, the Government's actions 'must [normally] be judged according to the standard applicable to a trustee engaged in the management of trust property.'").

Furthermore, if "a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary." Seminole Nation, 316 U.S. at 296; see Chitto, 133 Ct. Cl. at 661, 138 F. Supp. at 265. The Court of Claims held that plaintiffs bear

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> the burden of alleging and proving that they were entitled to be paid by the United States; that the Choctaw Nation, to which, under the terms of the 1855 treaty and the judgment of the Court of Claims on mandate of the Supreme Court, the amount of the judgement was paid, wrongfully refused to pay them, and that the United States under whose direction payments were made . . . , knew of should have known that the Choctaw Nation was wrongfully withholding payment from individual claimants rightfully entities to such payments.

Chitto, 133 Ct. Cl. at 661, 138 F. Supp. at 265.

Plaintiffs contend that the United States violated its duty because the Government "knew or should have known that the Tribe was be excluded from treaty payments." See Plfs' Br. at 19-20. Defendant counters that the Government satisfied its obligation to the Pottawatomi Nation as a whole and that any additional payment would be a gratuity. See Def's Br. at 7-8. Defendant contends that the "proportionate share" between the Wisconsin Band and Canadian Pottawatomi, determined in the Wooster Report, did not "admit[ ] that there was a 'debt,' or that the United States 'owed'" anything to the Canadian Pottawatomi. See id. at 7.

Resolution of this issue will turn on the history leading up to the Wooster Report and the Government's actions in response to it -- specifically, whether any duty can be implied running to plaintiffs by the Government's implementation of an award payable to the Wisconsin Band, but not to the Canadian Pottawatomi. This could be a thin reed for plaintiffs or a potential admission for defendant. The risks of litigating the issue are obvious.

6. Whether payment would be a gratuity

The governing statute for congressional reference cases limits bases upon which the Hearing Officer may recommend recovery. See 28 U.S.C. § 2509(c). The report to Congress should include the "amount, if any, legally or equitably due from the United States to the claimant." Id. Any other basis for recovery is not permitted by the grant of authority in the statute. "In recent years, the Court has uniformly employed the term 'gratuity' as applying to the situation where no legal or equitable claim has been established such that no award is recommended -- that is, any payment would be a 'gratuity.'" Banfi Prods. Corp. v. United States, 41 Fed. Cl. 581, 583 (1998) (Review Panel) (citing, among other cases, Menominee Indian Tribe of Wis. v. United States, 39 Fed. Cl. 441, 458 (1997); INSLAW, Inc. v. United States, 39 Fed. Cl. 307, 410 (1997); Paul v. United States, 21 Cl. Ct. 758, 767 (1990); White Sands Ranchers of N.M. v. United States, 16 Cl. Ct. 13, 17 (1988); Pomaski v. United States, 230 Ct. Cl. 713, 714 (1982); Stewart v. United States, 227 Ct. Cl. 511, 512 (1981)).

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7. Damages

Under the ICCA, the Federal Circuit held that "Congress intended the [Indians] to have the full panoply of remedies -- legal, equitable and moral -- laid out in the five clauses of the [ICCA]." Confederated Tribes, 964 F.2d at 1115 (quoting Cherokee Nation v. United States, 937 F.2d 1539, 1547 (10th Cir. 1991); see Navajo Tribe, 224 Ct. Cl. at 185, 624 F.2d at 988 (stating that "beneficiary is entitled to recover unless the fiduciary affirmatively establishes that it properly discharged its trust, and the theory that failure to render the precise form of accounting required may be sufficient, in and of itself, to establish liability").

Although their complaint does not specify the amount of money that plaintiffs seek, the Hearing Officer was working with a demand predicated on the $1,517,226.00 amount recommended in the Wooster Report for the Canadian Pottawatomi projected over 89 years. After a litigation risk analysis, discussed in detail with counsel and their principals, the Hearing Officer recommended $1.83 million, less a non-interest bearing fund of $500,000.00 to indemnify the United States for costs related to future litigation, for a ten-year period, the balance of which would be paid to plaintiffs at that time. The Hearing Officer and the parties also discussed, in lieu of the fund, the possibility of plaintiffs' instituting litigation in Canada to resolve all potential claims by other Pottawatomi residing in Canada.

The parties settled for the exact amount that the Hearing Officer recommended: $1.83 million. Commendably, they designed a procedure to institute a class action in Canada, at plaintiffs' expense, so that the United States, once and for all, will be making a final payment to all qualifying Pottawatomi and will not face future claims.

CONCLUSION

The Hearing Officer concludes that payment of the $1.83 million settlement is not a gratuity because 1) significant risks of litigation exist for both parties, which are being compromised; 2) the parties adopted the Hearing Officer's recommended amount; and 3) that recommendation was based on an analysis of hundreds of historical documents, treaties, statutes, and the case law. The amount and terms of settlement are predicated on a credible legal claim, and the settlement amount and terms are in the interests of justice.

The parties have requested that the Hearing Officer issue the opinion, after their executed Stipulation for Recommendation of Settlement Agreement was filed on September

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5, 2000. They also advised that, upon the filing of this report, they intend to file a joint notice that neither party excepts to the report and that both respectfully request its expedited adoption and transmission to Congress.

IT IS SO ORDERED.

Christine O. C. Miller

Christine Odell Cook Miller
Hearing Officer

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CONGRESSIONAL REFERENCE
TO THE
UNITED STATES COURT OF FEDERAL CLAIMS

Congressional Reference No. 94-1037X

The Hon. Christine Odell Cook Miller

POTTAWATOMI NATION IN CANADA, for and on behalf of its members, and as parens patriae for its members, and Edward Williams, Chairman of the Executive Council of the Pottawatomi Nation in Canada, Cynthia Wesley Esquimaux, Vice-Chair of the Executive Council, Stewart King, Executive Council member, Frank Shawbedees, Executive Council member, on their behalf and on behalf of members of the Pottawatomi Nation in Canada,

plaintiffs,

v.

UNITED STATES,

defendant.

STIPULATION FOR RECOMMENDATION OF SETTLEMENT

THE POTTAWATOMI NATION IN CANADA, Plaintiffs herein, and the UNITED STATES OF AMERICA, defendant herein, hereby stipulate and agree that the Court of Federal Claims and Review Panel may report to Congress as follows:

I. BACKGROUND

1. This Congressional Reference was sought and obtained by Plaintiffs following the dismissal in 1992 of an action against the United States for money damages and payment of

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unpaid treaty annuities commenced by the Pottawatomi Nation in Canada. The Court of Federal Claims ruled that the action was barred under the statute of limitations. Pottawatomi Nation in Canada v. United States, 27 Fed. Cl. 388 (1992).

2. The proceedings in this Court pursuant to the Congressional Reference were commenced on behalf of the Pottawatomi Nation in Canada by representatives claiming to act on behalf of any and all of the past, present, or future members and descendants of the Pottawatomi Nation in Canada. The Pottawatomi Nation in Canada alleges that it is an identifiable group of Indians residing in Canada who have organized themselves as what would be in the United States an unincorporated association, elected an Executive Council, and is headquartered at Moose Deer Point, PO Box 119, Mactier, Ontario POC 1HO, Canada. The United States is without sufficient information to admit or deny the past, present, or future membership, descendants or status of the Pottawatomi Nation in Canada.

3. This action has been brought by the Pottawatomi Nation in Canada, and is being pursued by Edward Williams, Chairman of the Executive Council of the Pottawatomi Nation in Canada, Cynthia Wesley Esquimaux, Vice-Chair of the Executive Council, Stewart King, Executive Council-member and Frank Shawbedees, Executive Council member, acting on behalf of themselves and all other members of the Pottawatomi Nation in-Canada and appearing in a representative capacity, asserting that they act in paren patriae for the members of the Pottawatomi Nation in Canada. The Plaintiffs herein shall be referred to as the "Pottawatomi Nation in Canada," or as "Pottawatomi," or simply as "Plaintiffs."

4. The information obtained through discovery in this case was developed through research from the following experts and a large number of historical documentary exhibits:

EXPERT FOR THE PLAINTIFFS: POTTAWATOMI NATION IN CANADA:

(a) Dr. Helen Tanner is a Senior Research Fellow at the Newberry Library in Chicago, Illinois. Dr. Tanner received her Ph.D. in history from the University of Michigan in 1961. She has over thirty years of experience in researching, writing and lecturing on the history of the indigenous peoples of the Americas. She is a recognized expert on the history of Indian tribes in the Great Lakes region, and is the editor of the Atlas of Great Lakes Indian History, (Norman: University of Oklahoma Press, 1987). She has testified and prepared expert reports in eleven cases presented before the Indian Claims Commission from 1963 to 1976, and before the federal Court of Claims in 1982 and 1988. These cases covered the tribal history, territory, and evaluation of ceded lands and reservations for the following tribes: Wyandot, Shawnee, Miami, Sisseton and Wahpeton Sioux, Teton Sioux, Chippewa, Ottawa, and Pottawatomi.

EXPERT FOR THE DEFENDANT: UNITED STATES OF AMERICA:

(b) Dr. Edward Angel is a co-founder and partner of Morgan, Angel and Associates, which is a firm specializing in litigation support and expert witness reports and testimony in American Indian, land, and natural resource matters. Dr. Angel received his Ph.D. in history from the George Washington University in 1979. He has created specific and rigorous research plans based on case requirements at numerous repositories, including the National Archives and its branches, university collections, and historical societies. He has testified as an expert witness in four trials before the United States Claims Court that involved tribal claims brought pursuant to the Indian Claims Commission Act, including: Docket 22-H, White Mountain Apache Tribe of Arizona; and, Docket 236-N,

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5. The experts have prepared an extensive and voluminous study and record of the claims of the Pottawatomi Nation in Canada and its ancestors.

6. The Stipulations herein are based upon an extensive study and review of the claims by counsel and their experts, and the settlement proposed to the Court of Federal Claims is justified and supported by competent evidence.

7. The parties agree that the Stipulations stated here are for the sole purpose of settling these claims in resolving this Reference. These Stipulations may not be used or asserted in any other proceeding or case in any country, or in this case if the Court, Review Panel (or Congress) does not approve this settlement. Nor shall these stipulations be viewed as precedential in any way.

II FACTUAL BASIS FOR PLAINTIFFS' CLAIMS

8. The Pottawatomi Nation in Canada seeks compensation from the United States for alleged breach of fiduciary and statutory duties arising from a series of treaties between 1795 and 1846. By these treaties, the United States agreed to make payments, some in perpetuity, and furnish other consideration to the members of the Pottawatomi Nation residing in the United States. In return, the Pottawatomi ceded title and aboriginal rights to vast amounts of land surrounding the Great Lakes region, including land in Indiana, Ohio, Illinois, Wisconsin and Michigan, and, the Government alleges, the Pottawatomi Nation agreed to remove west of the Mississippi River to tracts of land set aside by the United States for their use and benefit. After signing the Treaty of Chicago, the United States Senate would not consent to ratification until the land promised by the Treaty Commissioners to the Pottawatomi in Missouri was switched to

other lands in Iowa that were more acceptable to the Senate. This revised Treaty was ratified by the United States Senate. The 1833 Treaty of Chicago was the last treaty of cession, whereby the United States restated and acknowledged its obligations under the earlier treaties with the Pottawatomi and also sought to annex the remaining Pottawatomi tribal estate surrounding Lake Michigan.

9. Members of the Pottawatomi Nation in Canada base their claim to compensation as the alleged descendants and successors-in-interest of American Pottawatomi who moved to Canada during various periods after concluding treaties of cession. Plaintiffs' alleged ancestors, who were part of a group known as the "Wisconsin Band of Pottawatomis" (hereafter "Wisconsin Band") did not move west after the Treaty of Chicago. The Band did not receive treaty annuities from the United States after 1838 because federal authorities stopped distributing funds to those Pottawatomi who refused to move west of the Mississippi River and to those who moved to Canada.

10. After 1838, the Secretary of the Interior suggested that the Wisconsin Band may have forfeited its annuities by not moving. Congress, however, appropriated $10,000 for the Band in 1864. The United States Treasury was directed to maintain the unpaid annuities for the Wisconsin Band's credit until it moved west. Hannahville Indian Community v. United States, 4 Cl. Ct. 445 (1983), aff'd, 732 F.2d 167 (Fed. Cir. 1984), cert. denied, 469 U.S. 824 (1984).

11. The Wisconsin Band petitioned Congress for its unpaid annuities in 1903. Congress instructed the Secretary of the Interior to investigate the claims and identify the amount retained in the Treasury to the Band's credit pursuant to the 1864 Act. If none were retained, the Secretary was to determine the amount that should have been retained. Hannahville Indian

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Community v. United States, 4 Cl.Ct. 445 (1983), aff'd, 732 F.2d 167 (Fed. Cir. 1984), cert. denied, 469 U.S. 824 (1984).

12. In 1908, the Secretary of the Interior reported back to Congress in H.R. Doc. No. 830, 60th Cong., 1st Sess. (1908) [hereafter "1908" or "Wooster" report]. In preparing the 1908 Report, the Indian Affairs Office ordered Dr. W.M. Wooster, Clerk and Special Disbursing Agent, to conduct a census of the Wisconsin Band, including those members who may have been residing in Canada at the time. Among others, the following instruction was given: "The fact of their residence in a foreign country is held not to affect their right to enrollment with the Pottawatomi of Wisconsin for the purposes of the act under which the roll is to be prepared." H.R. Doc. No. 830, 60th Cong., 1st Sess. 20 (1908).

13. In the 1908 Report, the Secretary of the Interior reported that "these rolls are believed by the Commissioner of Indian Affairs to be as nearly correct and complete as is practicable to make them. Of the total number enrolled, 457 reside in Wisconsin and Michigan and 1550 in the Dominion of Canada." H.R. Doc. No. 830, 60th Cong., 1st Sess. 6 (1908).

14. In the 1908 Report, the Secretary concluded that the proportionate share of the unpaid annuities of the Wisconsin Band, including those residing in Canada, for the period between 1838 and 1907, would have been $1,964,565.87.

15. In the 1908 Report, Congress accepted the Secretary's investigation which found that the proportionate amount that the members of the Wisconsin Band residing in the United States would have received had they remained with the Pottawatomi who removed west of the Mississippi River, was $447,339, which amount was subsequently appropriated and paid thereto. No funds, however, were appropriated for the Pottawatomi residing in Canada.

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16. The Pottawatomi, residing both in the United States and Canada, filed claims with the Indian Claims Commission (ICC) in 1948, to recover the remainder of the unpaid annuities. Hannahville Indian Community v. United States, No. 28 (Ind.Cl.Comm. filed May 4,1948). The ICC dismissed the claims of the Pottawatomi residing in Canada on the ground that the ICC had no jurisdiction to determine the claims of Indians residing outside the territorial limits of the United States. The Pottawatomi filed a petition for appeal with the ICC in March 1949, but moved to dismiss their appeal on January 3, 1950. Hannahville Indian Community v. United States, 115 Ct.Cl. 823 (1950).

17. The Pottawatomi residing in the United States filed an amended petition with the ICC in 1951, identifying themselves as those Pottawatomi "whose places of abode are in Michigan and Wisconsin." Their case was transferred from the ICC to the United States Court of Claims in 1978. Hannahville Indian Community v. United States, 41 Ind.Cl.Comm. 304 (1978). The Claims Court acquired the case in 1982, and entered judgment for the Pottawatomi residing in the United States in 1983. Hannahville Indian Community v. United States, 4 Cl.Ct. 445 (1983). The Claims Court expressly excluded the Pottawatomi residing in Canada from its decision and stated that they were not involved in those proceedings. Id. at 456.

18. The Pottawatomi residing in the United States appealed this decision to the Court of Appeals for the Federal Circuit, arguing that the lower court's findings on the amount of damages were incomplete. The Federal Circuit affirmed the Claims Court's decision on damages, and the United States Supreme Court denied certiorari. Hannahville Indian Community v. United States, 4 Cl.Ct. 445 (1983), aff'd, 732 F.2d 167 (Fed.Cir.), cert. denied, 469 U.S. 824, (1984).

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